(1)

91-1862

No. 92-

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

DAVID GANTT, *et al.*,
Appellants,

v.

DEAN SKELOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

EDWARD N. COSTIKYAN
(Counsel of Record)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Attorneys for Appellants Reid, Avigdor, Bright, Freilich, Grant, Grande, Henry, Osorio, Ackerman, Flake, Manton, Owens, Rangel, Schumer and Solarz

C. DANIEL CHILL
(Counsel of Record)
GRAUBARD, MOLLEN, HOROWITZ, POMERANZ & SHAPIRO
600 Third Avenue
New York, New York 10016
(212) 818-8800

Attorneys for Appellants the Assembly of the State of New York, Saul Weprin and David Gantt

LIST OF PARTIES

Appellants

David Gantt, individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; Saul Weprin, Speaker of the Assembly of the State of New York; the Assembly of the State of New York; Asquith Reid, Morton M. Avigdor, Vivian Bright, Bernard Freilich, Corinna Grant, Laraine A. Grande, Lorrelle Henry, and Luis Osorio, each a voter in the State of New York; and Gary L. Ackerman, Floyd H. Flake, Thomas J. Manton, Major R. Owens, Charles B. Rangel, Charles E. Schumer, and Stephen J. Solarz, each individually as a voter in the State of New York and as a Member of the U.S. House of Representatives.

Appellees

Dean Skelos, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; the New York State Task Force on Demographic Research and Reapportionment; Ralph Marino, Majority Leader of the New York State Senate; Mario Cuomo, Governor of the State of New York; the Senate of the State of New York; Stan Lundine, Lieutenant Governor of the State of New York; the Board of Elections of the State of New York; Puerto Rican Legal Defense and Education Fund, Inc.; Evelyn Corchardo and Michael T. Waring.

QUESTIONS PRESENTED

Under the Anti-Injunction Act, 28 U.S.C. § 2283, was it error for the court below to enjoin a state court from adjudicating an apportionment case involving congressional district lines on the ground that the injunction was "in aid of" the federal court's jurisdiction to adjudicate the same dispute?

Under the principles of federalism reflected in this Court's decisions in *Scott* v. *Germano*, 381 U.S. 407 (1965), and *Younger* v. *Harris*, 401 U.S. 37 (1971), was it error for the court below to decline to abstain from exercising jurisdiction to adjudicate an apportionment dispute over congressional district lines when a state court had already asserted jurisdiction to adjudicate the same dispute, and is ready, willing, and able to do so?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINION BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED 4

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

THE QUESTIONS PRESENTED ARE SUBSTANTIAL 11

I. THE ANTI-INJUNCTION ACT PROHIBITS THE INJUNCTION BELOW 11

A. The All Writs Act Is No Basis for the Injunction Below 11

B. The Pendency of a Voting Rights Act Claim Cannot Justify the Injunction Below 16

C. The Existence of a § 1983 Claim Cannot Justify the Injunction Below 18

Page

II. THE FEDERAL COURT'S INJUNCTION NOT ONLY EXCEEDS ITS AUTHORITY AND VIOLATES PRINCIPLES OF COMITY BUT ALSO CONTRAVENES THIS COURT'S DECISION IN *SCOTT* v. *GERMANO* AND WELL-ESTABLISHED PRINCIPLES OF ABSTENTION 20

A. *Scott* v. *Germano* and its Progeny Require that, in Reapportionment Matters, the Federal Court Defer to the State Court 20

B. The Federal Court Should Have Abstained from Interfering with the Pending New York State Proceeding under the *Younger* Doctrine 23

C. *Burford* Dictates that Federal Courts Abstain in Matters in which Predominant State Interests are at Stake 24

D. The Lower Court's Reliance on *Harman* and *Colorado River* Confuses Established Abstention Doctrines 26

CONCLUSION 28

Page

APPENDIX

MEMORANDUM AND ORDER OF THREE-JUDGE COURT, MAY 5, 1992 . . . . . 1a

DECISION AND ORDER OF STATE COURT, MAY 5, 1992 . . . . . 10a

ORDER OF THREE-JUDGE COURT RE: STAY 13a

NOTICE OF APPEAL 16a

TABLE OF AUTHORITIES

CASES **Page(s)**

Alabama Public Service Comm'n. v. *Southern Ry. Co.*, 341 U.S. 341 (1951) 25

Amalgamated Clothing Workers v. *Richman Bros Co.*, 348 U.S. 511 (1955) 12

Atlantic Coast Line R.R. v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) 12, 13, 17

Badham v. *Eu*, 568 F. Supp. 156 (N.D. Cal. 1983), *aff'd mem.*, 785 F.2d 314 (9th Cir. 1986) 22

Battle v. *Liberty National Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989) 14

Bianchi v. *Griffing*, 393 F.2d 457 (2d Cir. 1968) 22

BT Investment Managers, Inc. v. *Lewis*, 559 F.2d 950 (5th Cir. 1977) 25

Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943) 24, 25

Chapman v. *Meier*, 420 U.S. 1 (1975) 21

Chick Kam Choo v. *Exxon Corp.*, 486 U.S. 140 (1988) 12

Page(s)

Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976) 10, 26, 27

Cotlow v. *Emison*, 112 S.Ct. 855 (1992) 2, 15, 20, 22

Emison v. *Growe*, Civil #4-91-202 (D. Minn. Dec. 5, 1991) 16

Emison v. *Growe*, 782 F. Sup. 427 (D. Minn. 1992) 16

Fay v. *South Colonie Cent. School Dist.*, 802 F.2d 21 (2d Cir. 1986) 25

Gibson v. *Berryhill*, 411 U.S. 564 (1973) 24

Growe v. *Emison*, 60 U.S.L.W. 3673 (March 30, 1992) 5

Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) 17

Harman v. *Forssenius*, 380 U.S. 528 (1965) 10, 26, 27

Hathorn v. *Lovorn*, 457 U.S. 255 (1982) 17

Page(s)

In re Baldwin-United Corp.,
770 F.2d 328 (2d Cir. 1985) 14

Ince v. *Rockefeller*, 290 F. Supp. 878
(S.D.N.Y. 1968) 22

Kline v. *Burke Constr. Co.*,
260 U.S. 226 (1922) 13

Law Enforcement Ins. Co. v. *Corcoran*,
807 F.2d 38 (2d Cir. 1986), *cert. denied*,
481 U.S. 1017 (1987) 25

Louisiana Power & Light Co. v. *City of Thibodaux*, 360 U.S. 25 (1959) 25

McNeill v. *New York City Housing Authority*, 719 F. Supp. 233
(S.D.N.Y. 1989) 19

Members of California Democratic Congressional Delegation v. *Eu*,
No. C-91-3383 FMS (N.D. Cal.
Mar. 3, 1992) 22

Middlesex County Ethics Committee v. *Garden State Bar Assn.*,
457 U.S. 423 (1982) 23

Miofsky v. *Superior Court of State of California*, 703 F.2d 332
(9th Cir. 1983) 19

Mitchum v. *Foster*,
407 U.S. 225 (1972) 18, 19

New York State Ass'n For Retarded Children, Inc. v. *Carey*, 727 F.2d 240 (2d Cir. 1984) 25

Penn General Casualty Co. v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935) 14

Pennzoil Co. v. *Texaco, Inc.*, 481 U.S. 1 (1987) 23

Railroad Comm'n v. *Pullman Co.*, 312 U.S. 496 (1941) 10, 26

Scott v. *Germano*, 381 U.S. 407 (1965) 20, 21, 22 23, 24, 26

Skolnick v. *State Electoral Bd. of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971) 14

Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383 (4th Cir. 1974) 14

United States v. *International Bhd. of Teamsters*, 907 F.2d 277 (2d Cir. 1990) 10, 14

Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977) 13, 14, 19

Page(s)

Voinovich, et al. v. *Quilter, et al.*,
112 S. Ct. 1663 (1992) 22

White v. *Weiser*, 412 U.S. 783 (1973) 25

White v. *White*, 731 F.2d 1440
(9th Cir. 1984) 19

Yonkers Racing Corp. v. *City of Yonkers*,
858 F.2d 855 (2d Cir. 1988),
cert. denied, 489 U.S. 1077 (1989) 14

Younger v. *Harris*, 401 U.S. 37 (1971) 23, 24, 27

STATUTES

28 U.S.C. § 1651 . . . . . 4, 11
28 U.S.C. § 2283 . . . . . 1, 2, 4, 11,
12, 14, 15, 16
42 U.S.C. § 1983 . . . . . 18, 19
U.S. Constitution, Article 1,
section 4 . . . . . 3, 4, 20

OTHER AUTHORITIES

1A *Moore's Federal Practice*,
§ 0.211 at 2351(1991) 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 92-_____

DAVID GANTT, *et al.*,

Appellants,

vs.

DEAN SKELOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

This is an appeal from an order of a three-judge federal court, dated and entered May 5, 1992, enjoining all parties and counsel from proceeding in the action entitled *Reid, et al.* v. *Marino, et al.*, No. 9567/92, pending in the Supreme Court of the State of New York for the County of Kings (the "State Court Action").

The three-judge federal court—which was no further along than the State Court in adjudicating the apportionment dispute—summarily restrained the prior pending State Court Action without mention of or regard to the Anti-Injunction Act, 28 U.S.C. § 2283, and in derogation of this Court's express instructions that federal courts should defer to state courts in apportionment matters.

The lower court's injunction thus conflicts directly with this Court's ruling in *Cotlow* v. *Emison*, 112 S. Ct. 855 (1992), in which this Court unanimously and summarily vacated an identical injunction. In *Cotlow*, as here, a prior state court action challenged the State's existing congressional apportionment. There, as here, a later federal action was filed seeking the same relief. There, as here, parties moved before the three-judge court to enjoin the state court action. There, as here, the federal court granted the injunction. There, this Court promptly lifted the order without dissent. The Court should do the same here.

The action in which the court below issued the injunction is brand new. The pleading here seeks exactly the same relief—a court-devised redistricting plan for New York's congressional districts—as the action in New York Supreme Court. There are no judgments or orders in either case adjudging the merits. Both courts have issued comparable scheduling orders. On the day the injunction issued, acting more expeditiously than the federal court was prepared to proceed, the New York Supreme Court appointed special masters or "referees" to devise an apportionment plan.

In short, at the time the injunction issued last week, parallel cases were pending in federal and state court, both seeking the same relief and in essentially the same posture. On that basis alone, the federal court ruled that "this dispute *must* be decided in one forum" (emphasis in original) and that, consequently, the New York Supreme Court action must be enjoined. App. 8a.

This was plain error. The Anti-Injunction Act expressly forbids an injunction against state court proceedings unless one of three narrow exceptions apply. Two of those exceptions—when expressly authorized by Congress or when necessary to effectuate or protect a judgment—are plainly inapplicable here. The third exception on which the court below relied—permitting an injunction when necessary in aid of the federal court's jurisdiction—does not authorize a federal court to abort a state action simply because the state case is a parallel *in personam* action seeking comparable relief.

The injunction issued below is a stake in the heart of federalism; that the order enjoins an apportionment case deepens the wound. The federal proceeding, like the State Court Action it restrains, is a suit against only New York State agencies and New York State officials involving the apportionment for the election in New York State of representatives from New York State to the U.S. Congress. Article I, section 4, of the U.S. Constitution expressly reposes the task of apportioning congressional districts in the States, not the federal government. The Supreme Court of the State of New York has the exact same duty as the federal court—and, we respectfully submit, the primary right—to apply federal and State constitutional principles to the task of apportionment. For a federal court to decide for itself that such a matter of acute State interest must be addressed only in a federal court disregards the comity and deference that this Court has repeatedly instructed the lower federal courts to observe toward state courts.

The injunction should be vacated.

OPINION BELOW

The Memorandum and Order of May 5, 1992, issued by the three-judge federal court in *Puerto Rican Legal Defense and Education Fund, Inc.* v. *David Gantt, et al.*, 92 CV 1521 (SJ) and *Waring* v. *David Gantt, et al.*, 92 CV 1776 (SJ), and filed in the United States District Court for the Eastern District of New York, has not been reported. It is reprinted in the Appendix at App. 1a-10a.

JURISDICTION

The Order appealed from was entered May 5, 1992. An application for an order staying that portion of the Order enjoining the State Court Action pending appeal to this Court was heard and denied on May 6, 1992. App. 14a-15a.

A notice of appeal to this Court was timely filed on May 6, 1992. App. 16a-23a. On May 13, 1992, this Court entered an order staying the injunction below pending this appeal.

The jurisdiction of this Court to review the three-judge court's order is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, article I, section 4, provides:

> The Times, Places and Manners of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreement to the usages and principles of law.

28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

The Parties

Appellants here fall into two groups.

One consists of the plaintiffs in the State Court Action. None of these appellants is a party in the federal court action. Still, the federal court order expressly enjoins them from proceeding in the State Court Action. App. 8a.

The other group of appellants consists of certain defendants in the federal court action. These are the Assembly of the State of New York; the Speaker of the Assembly, Saul Weprin; and Assemblyman David Gantt, who is co-chair of the New York State Legislative Task Force on Demographic Research and Reapportionment. The Assembly and its Speaker are also defendants in the State Court Action.

Appellees also fall into two groups.

One group of appellees consists of certain defendants in the federal court proceeding. These are the New York Senate; its majority leader (Ralph Marino); the Legislative Task Force on Demographic Research and Reapportionment and one of its co-chairs (Dean Skelos); and the Governor and Lieutenant Governor of the State (respectively, Mario M. Cuomo and Stan Lundine). Of these, all but the Legislative Task Force and its co-chair, Mr. Skelos, are parties defendant in the State Court Action.

The other group is plaintiffs in the federal court action: the Puerto Rican Legal Defense and Education Fund, Inc., and two individuals who are alleged to be residents of and voters in New York State.

The Apportionment Dispute

Based on the 1990 Census figures, New York State lost three of its thirty-four congressional districts; the State was allocated thirty-one of the 435 voting seats in the Congress to convene in January 1993. This loss of three seats means that New York must redraw its congressional district lines before the 1992 elections.

Under New York law, the New York State Legislature is charged with the responsibility for redrawing congressional districts. N.Y. State Law § 111 (McKinney 1984). The election calendar dictates when this must be done. Under the existing legislative timetable, to compete in party primaries scheduled for September 15, 1992, candidates for Congress must begin to circulate designating petitions by June 9. This means that, in advance of June 9, the new congressional lines must have already been subjected to administrative or judicial review under the Voting Rights Act, which requires preclearance of the lines affecting three of the five counties or "boroughs" in New York City.

Despite this timetable, the Legislature has failed to adopt an apportionment plan. The partisan division between the two houses of the Legislature has complicated efforts at agreement. On March 24, 1992, a leader of the apportionment effort in the Legislature declared an impasse.

The State Court Action

Less than forty-eight hours later, on March 26, 1992, eight individuals who are residents of and voters in Kings County, New York, plus seven incumbent Members of the U.S. House of Representatives commenced the State Court Action in the Supreme Court of the State of New York, County of Kings. The plaintiffs in the State Court Action promptly moved by order to show cause for an order requiring the Legislature to enact a congressional apportionment plan and providing, if the Legislature failed to act, for

proposed plans to be submitted to the State Court by May 1, 1992. The State Court set April 8, 1992 for a hearing on the motion.

The April 8 hearing did not take place as planned. On April 7, 1992, four of the ten defendants in the State Court Action filed a notice removing the State Court Action to federal court. That filing automatically precluded the State Court from proceeding any further with the State Court Action.

The removal notice lacked consent of all the defendants, as required by 28 U.S.C. § 1446. Accordingly, on April 17, 1992, the federal court granted the State Court plaintiffs' motion to remand the State Court Action.

Upon remand, the New York Supreme Court asserted the State Court's jurisdiction to adjudicate the controversy, and entered an order enabling the State Court to proceed expeditiously to the merits.[1/]

By May 4, 1992, the deadline the State Court established for legislative action, the Legislature had failed to act. On that day, the State Court held a hearing to receive proposed plans in evidence. The next day, May 5, 1992, the State Court issued an order stating its view of this Court's preference in apportionment cases:

[1/] The order provided:

A. On or before May 4, 1992, defendants must enact a 31-district Congressional redistricting plan that complies with Article I, Section 2 of the United States Constitution and Article I, Section 11 of the New York State Constitution.

B. If defendants do not enact such a plan by May 4, 1992, then, on that date, plaintiffs and defendants are to submit proposed congressional redistricting plans, and accompanying supporting documents, for the purpose of assisting the court in devising a plan of reapportionment for use in the 1992 elections.

C. On May 4, 1992, the parties are to submit to the court the names of proposed expert witnesses, and all interested parties are to submit up to three names of proposed independent experts, and the qualifications of those experts, for purposes of the court's appointment of three referees to assist the court in formulating a reapportionment plan.

> While both the federal judiciary and the New York State Supreme Court may have concurrent jurisdiction to act in this matter, the United States Supreme Court has indicated on several occasions their preference that the state court exercise jurisdiction over reapportionment. . . . [T]his court. . . will retain jurisdiction until a final congressional redistricting plan has been enacted by the New York State Legislature and signed by the Governor or a plan has been adopted by this court. . . .

App. 10a.

In this same May 5 order, the State Court appointed three referees to assist the State Court in formulating a congressional apportionment plan.[2/] The State Court instructed the referees to hold hearings as soon as possible and to prepare "a written report containing a complete and valid reapportionment plan for the Congressional Districts of the State of New York on or before May 26, 1992." App. 11a.

The Federal Case

Five days after the State Court Action began, on March 31, 1992, certain appellees commenced this action, styled *Puerto Rican Legal Defense and Educational Fund, Inc.* v. *David Gantt, et al.*, 92 CV 1521 (SJ), in the United States District Court for the Eastern District of New York. In an order to show cause signed on April 1, 1992, the federal court set for hearing on April 7—the day before the scheduled State Court hearing— plaintiffs' application for an order providing a timetable for a court-devised plan. At the

---

[2/] The State Court's appointees were the Hon. Milton Mollen, a former Presiding Justice of the Appellate Division, Second Department of the New York Supreme Court, and a former Deputy Mayor of New York City; Hon. Vincent Delorio, a retired New York Court of Claims Judge; and Philip Roache, a professor of law at St. John's University. On May 13, 1992, upon notice of this Court's order staying the injunction below pending appeal, the State Court issued a revised order replacing Judge Mollen with Hon. Frank J. Macchiarola, dean of the Cardozo Law School.

April 7 hearing, the three-judge court (Pratt, C.J., Martin, D.J., and Johnson, D.J.) entered an order directing the parties to submit plans by April 27, and allowing other interested parties to do so by May 4. This schedule did not contemplate action on an apportionment plan any sooner than the schedule in the State Court Action.

Lagging well behind was a second federal case—*Waring* v. *Gantt*, No. 92-CV-6134-T—which a lone voter commenced in the United States District Court for the Western District of New York on the same day as the State Court Action began. Various of the defendants in *Waring* were never served with a summons and complaint; none of the parties there (many of the same as in this action and the State Court Action) made any effort to seek preliminary relief or otherwise move that case along; indeed the first action taken in that case was the court's *sua sponte* decision there to transfer the action to the three-judge court below on April 9—well after proceedings in the State Court were underway. The two federal actions were thereafter consolidated.

The Injunction Ruling Below

On May 5, 1992—the same day the State Court appointed its referees to devise a congressional apportionment plan for the State—the court below held a status conference to set a timetable for further proceedings. At this hearing, the court announced its intention to delay one more week, to May 12, before appointing a special master or expert to compose a plan. The court said that, if the Legislature did not act by then, the court would direct a master or expert to devise a plan by May 26—the same day the State Court's order provides for completion of its referees' plan.

Also on May 5, the court below announced its decisions to deny the appellant Assembly's motion to abstain in favor of the State Court Action, and granted appellee State Senate's motion to

enjoin the State Court Action.[3/] The court said that, because only one congressional redistricting plan for New York State was needed, it would be "wasteful, unnecessarily confusing, and inefficient" to resolve the issues in more than one forum. App. 4a. Treating the abstention question as one arising under *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), and this Court's treatment of the *Pullman* doctrine in *Harman* v. *Forssenius*, 380 U.S. 528 (1965), the court held that abstention was inappropriate because this federal action involved "no disputed questions of state law." App. 7a.

Having decided not to abstain, the court below then concluded that it had no choice but to enjoin the State Court Action. The entirety of the lower court's reasoning was as follows:

> That said [that abstention is not warranted], and in light of the further reality that this dispute *must* be decided in one forum, we conclude that we must also exercise our power under the All Writs Act, 28 U.S.C. § 1651, to enjoin any further proceedings in the state court action. All of the claims presented in all three cases—[the two federal cases, now consolidated, plus the State Court Action]—are federal constitutional and Voting Rights Act claims involving the right to vote in an election for federal congressional representatives. Since we have a "virtually unflagging" obligation to decide federal claims, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976), we conclude that an injunction of the state redistricting case is both necessary and appropriate to protect our jurisdiction. *United States* v. *International Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990). The All

---

[3/] Not all the parties in the federal court action joined in or opposed these motions. Of the defendants below, appellees the Governor, Lieutenant Governor and the State Board of Elections took no position on either motion. As for the plaintiffs, only appellee Puerto Rican Legal Defense and Education Fund, Inc. opposed the motion to abstain and joined in the motion to enjoin the State Court Action.

> Writs Act, of course, gives us the power to enjoin not only parties to the action before us, but nonparties as well. *Id.*

App. 8a-9a.

On May 6, 1992, the court below denied appellants' motion for a stay of the injunction pending appeal to this Court. App. 14a-15a.

On May 12, 1992, the Legislature still having failed to act, the federal court named the Hon. Frederick B. Lacey, a former federal judge from New Jersey, as a special master to redraw New York's congressional district lines.

On May 13, 1992, on a reference from Justice Thomas of appellants' application for a stay of the injunction below pending appeal, this Court entered an order staying the portion of the lower court's order that enjoined the parties and counsel from proceeding in the State Court Action.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE ANTI-INJUNCTION ACT PROHIBITS THE INJUNCTION BELOW

A. The All Writs Act Is No Basis for the Injunction Below

The court below based its stay of all state court proceedings on the All Writs Act, 28 U.S.C. § 1651(a). App. 7a-8a. That Act, however, cannot justify the injunction.

The powers conferred on federal courts by the All Writs Act do not exceed the limits imposed on federal courts by the Anti-Injunction Act, 28 U.S.C. § 2283. The All Writs Act itself provides that any federal court injunction must be "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Thus, the phrase "in aid of...jurisdictions" in the All Writs Act, does not

create a general restraining power in the federal courts free of the limitations of the Anti-Injunction Act.

The lower court's injunction here cannot fit within the "in aid of jurisdiction" exception to the Anti-Injunction Act. There was no need for injunctive relief to protect the federal court's jurisdiction from the state court's concurrent jurisdiction.

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Anti-Injunction Act reflects the strong policies of comity and federalism, according to which state court proceedings "'should normally be allowed to continued unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court,'" *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146 (1988) (quoting *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970)). The Act does not convey "'a broad general policy for appropriate *ad hoc* application,'" but rather is "a clear-cut prohibition qualified only by specifically defined exceptions.'" *Atlantic Coast Line*, 398 U.S. at 287 (quoting *Amalgamated Clothing Workers* v. *Richman Bros Co.*, 348 U.S. 511, 515-16 (1955)).

The mere existence of two parallel *in personam* actions in state and federal court—involving nothing more than concurrent jurisdiction, overlapping issues and the possibility of inconsistent results—is not among those exceptions. Of particular importance here, that a state court may be simultaneously adjudicating an issue presented to a federal court does not mean that an injunction against the state proceeding is "necessary in aid of" the federal court's jurisdiction. The leading treatise on federal jurisdiction aptly summarizes the point:

> A litigant may bring parallel, even duplicative actions in federal and state court; the general rule is that where state and federal courts have concurrent jurisdiction over a case, neither court may prevent the parties from simultaneously pursuing claims in both courts. Moreover, it is now well established that the mere existence of a parallel action in state court does not rise to the level of interference necessary to permit injunctive relief under the "necessary in aid of jurisdiction" exception.

1A *Moore's Federal Practice*, § 0.211 at 2351 (1991).

Atlantic Coast Line, *supra*, so demonstrates. There, a federal court had held that the Norris-LaGuardia Act prohibited an injunction barring a labor union from picketing a railroad yard. Unhappy with the result, the railroad brought an action in state court and obtained an injunction. The federal court then enjoined the state court proceeding, reasoning that the Anti-Injunction Act's "in aid of jurisdiction" exception applied. In reversing the injunction, this Court held that, notwithstanding the inconsistent results, the "in aid of jurisdiction" exception could not be used to block the state action, because "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." 398 U.S. at 295.

The reasoning in *Atlantic Coast Line* echoed this Court's earlier ruling in *Kline* v. *Burke Constr. Co.*, 260 U.S. 226 (1922), which Justice (now Chief Justice) Rehnquist quoted with approval in the plurality opinion in *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977):

> [A]n action brought to enforce [a personal liability] *does not tend to impair or defeat the jurisdiction* of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and

> pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* . . ..

260 U.S. at 230 (emphasis added).

Indeed, the only circumstance in which this Court has explicitly upheld reliance upon the "in aid of jurisdiction" exception to the Anti-Injunction Act or its antecedents is the situation for which the exception was plainly intended: when, in an *in rem* action in federal court, a state court proceeding threatens to deprive the federal court of control over the *res*. *See, e.g., Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935) (injunction necessary to protect federal court's ability to control and dispose of property in liquidation proceeding). The lower courts have, on rare occasion, enlarged the exception to include certain extraordinary *in personam* actions. Each of these unusual cases, however, has involved, at the time the injunction issued, a pre-existing order adjudging the merits in a mature federal action, the efficacy of which a subsequent state court suit directly imperiled. None has involved two parallel actions moving at the same or comparable pace in which neither court had reached a ruling on the merits.[4/]

[4/] *See, e.g., United States* v. *International Bhd. of Teamsters*, 907 F.2d 277, 280 (2d Cir. 1990) (injunction to protect federal court judgment); *Battle* v. *Liberty National Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989) (injunction proper to protect settlements entered in first-filed class actions, "involving years of litigation and mountains of paperwork," against state court action filed years later); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985) (upholding injunction against state court action, not yet begun, to protect ability of federal court to manage and settle multi-district class actions that had been pending for years); *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) (injunction requiring removal of state court proceeding that would have eviscerated existing federal consent decree); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383 (4th Cir. 1974) (injunction against state court interference with federal court's ability to monitor compliance with federal court school desegregation case); *Skolnick* v. *State Electoral Bd. of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971) (three-judge court) (injunction issued to prevent parties

(continued...)

The injunction below flies in the face of the Anti-Injunction Act and the principles of federalism that underpin that statute. The federal court here did not find that the State Court Action imperiled a pre-existing federal order on the merits of the apportionment dispute. Nor did the federal court find that the State Court would somehow impede the apportionment process, or was incapable of adjudicating the dispute. The court simply made a "practical" decision that only one court ought to pass on apportionment and then, noting that federal law and federal offices were in issue, cho itself to be that forum.

That is not a choice that a federal court is free to make. The lower court's suggestion that the federal court could move more swiftly than the New York State Supreme Court is untenable, and in any event no basis for the injunction. The lower court noted that, whereas its judgment would be directly appealable to this Court, the State Court's judgment would be subject to further state appeals. The court failed to note, however, that New York's appellate courts provide for expedited appeals and are keenly experienced in doing so in election law cases in a matter, not of days or weeks, but a few hours. Even were that not so, the Anti-Injunction Act does not authorize an injunction based on a federal court's guess about the likely timing of a state court proceeding.

The injunction below is irreconcilable with this Court's unanimous decision vacating an identical injunction in *Cotlow* v. *Emison*, 112 S.Ct. 855 (1992). That case mirrors this one in all relevant respects; the litigations involved were parallel federal and state actions to reapportion congressional districts. Like the State Court Action here, the state action there was commenced first. There, both actions proceeded on parallel tracks until the state court announced that it had devised a state-legislative reapportionment plan. The three-judge court empaneled to hear the federal case then enjoined further proceedings in the state court action. In vacating

---

[4/](...continued)
from seeking a state court order modifying an apportionment plan that the federal court had already adopted).

that injunction without opinion, the Court set aside a lower court opinion that adopted the same rationale for an injunction adopted below. *See Emison* v. *Growe*, Civil #4-91-202 (D. Minn. Dec. 5, 1991).[5/]

The court below tried unsuccessfully to distinguish *Cotlow* on the ground that there, unlike here, an injunction was improper because the state court there was "on the eve of issuing final judgment." App. 7a. Yet on the lower court's reasoning here, that should have been all the more reason for justifying an injunction in *Cotlow*. Animating the injunction below was the concern that the State Court would enter a final judgment redrawing congressional district lines. The putative peril the court perceived from the State Court Action here was not that the State Court would do nothing but that the State Court would do its job to adopt a plan. It was precisely such a judgment that the court below saw as a threat to its jurisdiction. And it was precisely the threat of such a judgment that this Court deemed in *Cotlow* to be an insufficient ground to circumvent the Anti-Injunction Act.

B. The Pendency of a Voting Rights Act Claim Cannot Justify the Injunction Below

The lower court mistakenly concluded that the mere inconvenience or inefficiency of parallel proceedings in state and federal court triggers an exception to the Anti-Injunction Act because the pending federal case raises issues under the federal Voting Rights Act. App. 7a, 9a. But the Voting Rights Act claim provides no basis for the lower court's injunction.

[5/] Undaunted by this Court's reversal of its injunction, the three-judge panel in Minnesota refused to abstain and, on February 19, 1992, adopted a competing legislative redistricting plan, as well as a congressional districting plan, which the state court had not yet reached. *Emison* v. *Growe*, 782 F. Supp. 427 (D. Minn. Feb. 19, 1992). The federal court's failure to abstain there has been challenged, and this Court has granted certiorari. *Growe* v. *Emison*, 60 U.S.L.W. 3673 (Mar. 30, 1992).

First: That a state court proceeding may implicate federal statutory rights is not among the three explicit exceptions to the Anti-Injunction Act's absolute prohibition on injunctions against state court proceedings. As this Court held in *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1971), "a federal court does not have the inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Id.* at 294. Any other result would create an exception to the Anti-Injunction Act *whenever* a state court exercised concurrent jurisdiction over a matter arising under federal law, which would eviscerate the Anti-Injunction Act.

Second: The Voting Rights Act claim below is either stale or premature. As pleaded, the claim is that New York's *existing* congressional district lines violate the Voting Rights Act. But that claim is an anachronism: no one asserts that New York may employ its existing 34 congressional district lines to hold an election to fill the 31 seats now allotted to New York; everyone concedes that new lines are essential. Thus, the pleaded Voting Rights Act claim is a non-issue. And to the extent that the claim can be read to apprehend that newly-drawn lines may violate the Voting Rights Act, the claim is premature: no basis exists to suppose that newly-drawn lines will not fully comply with all applicable laws, including the Voting Rights Act.

Third: That no basis exists to assume non-compliance with the Voting Rights Act is true whether the lines are drawn in the court below or in the State Court Action. The state courts have concurrent jurisdiction to consider Voting Rights Act claims. *See Hathorn* v. *Lovorn*, 457 U.S. 255, 269 (1982); *see also Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (concurrent state court jurisdiction presumed absent explicit contrary congressional directive or state court disability to adjudicate). It follows that the New York Supreme Court is fully able to consider Voting Rights Act concerns in adjudicating this apportionment dispute. And the State Court has every incentive to do so: it

is nonsense to presume that the State Court would entertain a plan that would violate federal law.

Fourth: The proceedings in the State Court Action to date prove it. Every one of the plans submitted in that Action to date contains—and every party in the Action concedes the need for— the relief pleaded in the Voting Rights Act claim in the federal proceeding below: namely, that to comply with the Voting Rights Act any reapportionment plan must provide for at least two districts in New York City in which Latino voters hold an effective voting majority. At its hearing on May 4, 1992, the day before the proceeding was enjoined, the State Court expressly acknowledged the Voting Rights Act as an issue of concern. No basis exists—none at all—to suppose that the State Court will be any less attentive to that concern than the court below.

In short, the Voting Rights Act claim below did not entitle the lower court to enjoin the State Court Action. The injunction below is instead an assault on the federalist principle that a state court is equally if not better able to adjudicate questions of federal law if and when they arise in a proceeding properly pending before it. Here, the State Court was prepared to do so. It was error for the court below to stop those proceedings.

C. The Existence of a § 1983 Claim Cannot Justify the Injunction Below

The complaint in the action below pleaded claims under the federal civil rights statute, 42 U.S.C. § 1983. Under *Mitchum* v. *Foster*, 407 U.S. 225 (1972), that statute is an Act of Congress that comes within the "expressly authorized" exception to the Anti-Injunction Act. The court below properly did not rely on this provision to issue its injunction, though certain appellees urged the court to do so. It is readily apparent, however, that section 1983 provides no basis for the lower court's injunction.

The "expressly authorized" exception to the Anti-Injunction Act shares an obvious characteristic with the two other narrow and

extraordinary exceptions to the ban on enjoining state court proceedings: the exceptions are intended to permit an injunction in those rare circumstances in which *the state court proceeding itself threatens federal interests*. Just as the exceptions allow an injunction when a state court proceeding imperils the federal court's jurisdiction, so, too, does the Act allow an injunction when Congress has expressly authorized an injunction against a state court proceeding that threatens the interests Congress intended to protect. Thus, section 1983 permits an injunction against a state court proceeding only when that proceeding *itself* threatens the federal constitutional rights protected by section 1983.[9]

Such is not the case here. Here, the alleged deprivation of federal rights stems from the Legislature's failure to reapportion, not from the pendency of the State Court Action. Far from being a peril to federal interests, the State Court Action is instead an effort to enforce and vindicate the very same federal rights, among others, that section 1983 protects. In these circumstances, *Mitchum*'s holding that section 1983 actions are an exception to the Anti-Injunction Act is wholly inapposite. Indeed, were this not so, a federal court could always enjoin a state court from hearing apportionment cases, which by definition always potentially raise claims under section 1983. This Court's unanimous decision

---

[9] *See Mitchum* v. *Foster*, 407 U.S. 225 (1972)(federal court could enjoin state court proceeding against bookstore in bookstore owner's § 1983 action alleging that state proceeding to enforce state nuisance law violated his federal constitutional rights); *Miofsky* v. *Superior Court of State of California*, 703 F.2d 332, 334-35 (9th Cir. 1983)(federal court could enjoin discovery proceedings in state tort litigation against doctor if they violated doctor's federal constitutional rights); *White* v. *White*, 731 F.2d 1440, 1442-43 (9th Cir. 1984) (enjoining enforcement of state court divorce judgment against husband's military retirement benefits). *McNeill* v. *New York City Housing Authority*, 719 F. Supp. 233, 256 n.29 (S.D.N.Y. 1989)(enjoining landlords' state housing court eviction proceedings against low income tenants during pendency of their federal proceeding challenging city housing authority's policies). *Cf. Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977)(antitrust laws expressly authorize injunctions against state court proceedings if and only if the state litigation is itself the violation of the antitrust laws to be restrained).

vacating the injunction in *Cotlow* v. *Emison*, 112 S. Ct. 855 (1992), well attests to the fallacy of such a proposition.

II. THE FEDERAL COURT'S INJUNCTION NOT ONLY EXCEEDS ITS AUTHORITY AND VIOLATES PRINCIPLES OF COMITY BUT ALSO CONTRAVENES THIS COURT'S DECISION IN *SCOTT* v. *GERMANO* AND WELL-ESTABLISHED PRINCIPLES OF ABSTENTION

To hold that the injunction below was unauthorized by any exception to the Anti-Injunction Act, this Court need not reach the issue of whether the court below erred in failing to abstain from exercising jurisdiction. Nevertheless, the lower court's failure to defer to the state court action is an independent ground of clear error, for if the court should not have exercised jurisdiction—but deferred to the state court—then the court should not have issued the injunction at issue. The error here is obvious, because the very basis of the court's injunction—the concern that the State Court could and would adjudicate the case—is the reason the court was obliged to abstain.

A. *Scott* v. *Germano* and its Progeny Require that, in Reapportionment Matters, the Federal Court Defer to the State Court

Article I, section 4 of the United States Constitution expressly reposes the task of apportioning congressional districts in the States, *not* the federal government. *Scott* v. *Germano*, 381 U.S. 407 (1965), establishes that it is the state agencies, including the state courts, which have primacy in fashioning redistricting plans. In *Germano*, this Court held that apportionment is a matter for the States, and that, if judicial intervention is necessary, then the federal courts must defer to state courts. In that case, suits were brought in both state and federal court challenging the apportionment of the Illinois State Senate. On January 22, 1965, the federal

district court invalidated the district lines and directed that reapportionment plans be submitted to the court. On February 4, 1965—fourteen days later—the Illinois Supreme Court did the same thing. When the federal district court refused to stay its own proceedings in light of the state court's ruling, a direct appeal was taken to the Supreme Court. This Court reversed, holding:

> We believe that the district court should have stayed its hand. The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court, but appropriate actions by the States in such cases has been specifically encouraged.

381 U.S. at 409 (citations omitted).

Germano teaches that, when the *State* legislature fails to carry out its reapportionment responsibility, intrusion by the judiciary into this intensely political and divisive function is better left to the *state* court—even if (contrary to this case) the federal court had the opportunity to act first. Together with its progeny, the case recognizes that reapportionment—even of congressional district lines—is essentially a State concern, involving State officials, State interests, State election processes, and representatives of the State. These authorities reflect as well that the state courts—with judges who swear allegiance to the same Constitution as federal judges—are fully competent to adjudicate any issues of federal constitutional law that the controversy occasions. Accordingly, when, as here, a state court is ready, willing, and able to resolve an apportionment challenge that a federal court has yet to hear, the federal courts have invariably deferred to the state courts to do so, and dismissed or stayed the parallel federal proceeding.[7]

---

[7] *See Chapman* v. *Meier*, 420 U.S. 1, 27 (1975) (Court reversed federal court's reapportionment plan for the North Dakota state legislature, holding, among other things, that "reapportionment is primarily the duty and responsibility of the state (continued...)

Members of California Democratic Congressional Delegation v. *Eu*, No. C-91-3383 FMS (N.D. Cal. Mar. 3, 1992), is directly on point. In that case, the Governor of California brought an action in California state court to compel reapportionment, arguing that the legislature was at an impasse. Shortly thereafter, the Democratic members of the California congressional delegation commenced a second action in federal court, seeking essentially the same relief as was brought in the state case. In light of the first-filed state action and "guided" by the principles of *Germano*, the three-judge federal court abstained from proceeding, declined to enjoin the state court action, and dismissed the federal complaint.

This Court's orders staying federal court apportionment orders have consistently reflected these same federalist principles. For example, just last month, this Court, in *Voinovich, et al.* v. *Quilter, et al.*, 112 S. Ct. 1663 (1992), stayed an order of a three-judge federal court in Ohio that had enjoined a redistricting plan passed by the Ohio Redistricting Commission and approved by the Ohio Supreme Court. Likewise, in subsequent proceedings in *Cotlow*, on an application to stay the federal court ruling pending review, Justice Blackmun granted the stay on that portion of the order that conflicted with the state court order, and left undisturbed only the portion relating to matters that the state court had not yet adjudicated.

---

[2]/(...continued)
through its legislature or other body, rather than a federal court"); *Bianchi* v. *Griffing*, 393 F.2d 457, 461 (2d Cir. 1968) (first-filed federal action stayed in favor of later-filed state action to invalidate apportionment of Suffolk County Board of Supervisor districts on Fourteenth Amendment grounds, citing *Scott* v. *Germano*); *Members of California Democratic Congressional Delegation* v. *Eu*, No. C-91-3383 FMS (N.D. Cal. Mar. 3, 1992) (three-judge court); *Badham* v. *Eu*, 568 F. Supp. 156, 158 (N.D. Cal. 1983) (federal court abstained in deference to congressional redistricting by state court, noting that "[r]eapportionment, which is carried out by the states, is an area in which state courts are encouraged to require and formulate valid plans"), *aff'd mem.*, 785 F.2d 314 (9th Cir. 1986); *Ince* v. *Rockefeller*, 290 F. Supp. 878 (S.D.N.Y. 1968) (in suit challenging Assembly districts under Fourteenth and Fifteenth Amendments, federal court abstained in favor of first-filed state action).

In light of *Germano* and the line of federal cases that have followed the *Germano* mandate, the injunction was improvidently granted because the lower court should have abstained from this action in deference to the New York State Supreme Court.

B. The Federal Court Should Have Abstained from Interfering with the Pending New York State Proceeding under the *Younger* Doctrine

As first enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971), there is "a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *See Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

This policy has its roots in principles of federalism. It recognizes that federal courts should endeavor to protect federal rights and interests in a way that will not unduly interfere with the legitimate activities of the States. *Younger*, 401 U.S. at 44. Thus, *Younger* requires federal courts to defer to ongoing state court proceedings where the state proceedings implicate important state interests and afford federal plaintiffs an adequate opportunity to raise the constitutional challenges there. *Middlesex*, 457 U.S. at 432.

Younger is fully applicable to state civil proceedings. *Id.* at 432; *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 11 (1987) (*Younger* abstention applies "not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard comity between the State and the National Government.")

The instant action requires abstention under *Younger*. The state proceedings implicate important state interests: this case, as we have said, involves a duty the Constitution assigns to the *State* for *State* officials to apportion districts for representatives from the

State using the election processes of the *State*. The New York State Supreme Court has already assumed jurisdiction over the matter and has appointed three referees (from New York) to assist the State Court in formulating a congressional plan. The New York State Supreme Court proceeding fully affords an adequate opportunity for all parties to raise their federal constitutional challenges.

Finally, this action not only is subject to *Younger*, its continuation would be inconsistent with it. The lower court has granted an injunction that "enjoins all counsel and parties in the action . . . now pending in the Supreme Court in the State of New York, County of Kings, from taking any further steps or proceedings in that action." App. 8a. It is hard to imagine a request more at odds with the principles of federalism protected by *Younger* abstention. The *Younger* doctrine "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal to the state courts." *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973).

C. *Burford* Dictates that Federal Courts Abstain in Matters in which Predominant State Interests are at Stake

In addition to abstention under *Scott* v. *Germano*, and *Younger* v. *Harris*, the court below should have also abstained under the federal abstention doctrine enunciated by this Court in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

In *Burford*, this Court held that where the issues before a federal court involve matters in which the state has a predominant interest *and* where state courts can adequately and expeditiously decide those matters, the federal court should stay its hand, and dismiss the action, out of respect for the independence of state action. *Id.* at 334. In *Burford*, this Court affirmed the district court's judgment dismissing a complaint attacking the validity of an order of the Texas Railroad Commission which had granted petitioner a permit to drill, because the state's regulation of the oil industry involved Texas state policy, because judicial review in the

state courts was adequate and expeditious, and because ultimate review of federal questions by this Court was fully preserved.

This Court's holding in *Burford* has become an established doctrine of abstention by which federal courts refrain from exercising jurisdiction where doing so would involve needless conflict with the administration by a state of its own affairs. *See e.g.*, *Alabama Public Service Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 350 (1951) (injunction of commission order); *Law Enforcement Ins. Co.* v. *Corcoran*, 807 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987) (claims against an insolvent insurer); *Fay* v. *South Colonie Cent. School Dist.*, 802 F.2d 21, 31 (2d Cir. 1986) (matrimonial and family matters); *New York State Ass'n For Retarded Children, Inc.* v. *Carey*, 727 F.2d 240, 245 (2d Cir. 1984) (administration of New York's Medicaid system); *BT Investment Managers, Inc.* v. *Lewis*, 559 F.2d 950, 954 (5th Cir. 1977). The *Burford* doctrine dictates abstention in matters "intimately involved with the [state's] sovereign prerogative" or in matters "close to the political interests of [the] State." *See Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 28-29 (1959).

Redistricting squarely involves the type of sensitive state interest and sovereign prerogative contemplated by the *Burford* doctrine of abstention. It is well settled that redistricting is a matter of state policy. *See White* v. *Weiser*, 412 U.S. 783, 795 (1973) ("We hold that a district court should similarly honor state policies in the context of congressional reapportionment").

Here, in light of the sovereign state interests at stake in reapportionment, *Burford* mandates that the court below should have abstained from exercising jurisdiction over matters of New York redistricting because the State Supreme Court is adequately and expeditiously deciding these issues. It follows that the federal court should not have issued an injunction to protect the jurisdiction it should not have exercised in the first place.

D. The Lower Court's Reliance on *Harman* and *Colorado River* Confuses Established Abstention Doctrines

The lower court, relying on *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965), held that the federal court should not *abstain* when there are no disputed state law questions and the case involves an alleged "fundamental deprivation." *Harman*, which was decided before *Germano*, is inapposite. In *Harman*, the Court determined that a Virginia statute requiring the payment of a poll tax (or, in the alternative, the filing of a residency certificate) violated the Twenty-Fourth Amendment prohibiting poll taxes. There were *no* ongoing state proceedings; the Court merely declined to abstain pursuant to the abstention doctrine articulated in *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), which contemplates deference to state court proceedings when an issue of state law, which must be decided, is uncertain, and the resolution of that state law issue could eliminate the federal constitutional issue confronting a court. Nor did *Harman* involve redistricting, such that the *Germano* abstention doctrine, encouraging state courts to redistrict, was applicable. Thus, the lower court's use of *Harman* as a court-contrived "fundamental deprivation" abstention doctrine is unsupported by any principle of abstention.

Similarly, the lower court cites *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976) for its "virtually unflagging" obligation to decide claims, and thus not abstain from hearing the redistricting matter in deference to the state court. But *Colorado River* holds that a federal court has a "virtually unflagging" obligation to adjudicate federal claims *only if* no grounds exist to abstain. And even in that circumstance, *Colorado River* contemplates consideration be given to parallel state proceedings. Thus, this Court held that, if none of the abstention doctrines applied, then, based on "principles unrelated to . . . regard for federal-state relations" the federal court must still consider issues of judicial administration in deciding whether to proceed, and may defer to state proceedings in the interests of

judicial administration. *Id.* at 817. Thus, if anything *Colorado River* should have been an additional reason for the court below to abstain.

Finally, neither *Colorado River* nor *Harman* has anything to do with the form of abstention, stemming from *Younger* v. *Harris*, 401 U.S. 37 (1971), which instructs comity toward state courts and is applicable here. As such, the lower court should have abstained—and therefore should never have issued the injunction.

CONCLUSION

For the reasons set forth above, we respectfully request that the order of the court below enjoining all parties and counsel in the State Court Action from taking any further steps or proceedings in that action be vacated forthwith. And we respectfully renew the request made in our application for a stay of the lower court's injunction — that this Court give expedited consideration to our jurisdictional statement and to this appeal.

Dated: New York, New York
May 15, 1992

Respectfully submitted,

Edward N. Costikyan
(Counsel of Record)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
Attorneys for Appellants Reid, Avigdor, Bright, Freilich, Grant, Grande, Henry, Osorio, Ackerman, Flake, Manton, Owens, Rangel, Schumer and Solarz

Gerard E. Harper
Nicole L. Felton
Peter Sistrom
Of Counsel

C. Daniel Chill
(Counsel of Record)
GRAUBARD, MOLLEN, HOROWITZ,
POMERANZ & SHAPIRO
600 Third Avenue
New York, New York 10016
(212) 818-8800
Attorneys for Appellants the Assembly of
the State of New York, Saul Weprin
and David Gantt

Elaine Reich
Of Counsel

APPENDIX

WP5085DT:DOC01

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and EVELYN CORCHARDO,

Plaintiffs,

- against - CV-92-1521(SJ)

DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RAPLH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Defendants.

----------X

MICHAEL T. WARING,

Plaintiff,

- against -

DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe,

Defendants.

----------x

MEMORANDUM AND ORDER OF THREE-JUDGE COURT

CV-92-1776(SJ)

PER CURIAM:

This memorandum and order addresses the following matters: (1) a motion to enjoin, or in the alternative to remove, a state court suit, made by defendants Marino, Skelos, and the New York State Senate ("Senate defendants"); (2) a motion to dismiss, or in the alternative to stay these federal proceedings on abstention grounds, made by defendants Gantt, Task Force, Weprin, and the New York State Assembly ("Assembly defendants"); and (3) a motion to return the *Waring* v. *Gantt* case to the United States District Court for the Western District of New York, made by plaintiff Waring.

For the following reasons, the motion to dismiss or abstain is DENIED, the motion to enjoin the state court proceedings is GRANTED, and the motion to return *Waring* v. *Gantt* to the Western District is DENIED.

I.

All parties agree that New York's congressional elections cannot proceed based on the districts as currently drawn. New York must be redistricted into 31, rather than the current 34, congressional districts in order to comport with the 1990 census. Since the required redistricting eluded compromise through the political processes, this dispute has found its way into court. On March 26, 1992, one of these consolidated actions, *Waring* v. *Gantt*, was filed in the United States District Court for the Western District of New York. That same day, *Reid* v. *Marino*, Index No. 9567/92, was commenced in the New York Supreme Court, Kings County. On March 31, the other of these consolidated actions, *PRLDEF* v. *Gantt*, was filed in the United States District Court for the Eastern District of New York. Three-judge panels were appointed by the Chief Judge of the Second Circuit in both the *PRLDEF* and the *Waring* actions. *Waring* was transferred to this court by the three-judge panel of the United States District Court for the Western District of New York on April 9, 1992; both *Waring* and *PRLDEF* were thereafter consolidated pursuant to Fed.

R. Civ. P. 42(a), because the two actions seek substantially the same relief.

II.

The three pending cases can ultimately result only in a single approved congressional redistricting plan for New York State. Consequently, these issues must be resolved in a single forum; two courts simultaneously attempting to redistrict the state would be wasteful, unnecessarily confusing, and inefficient. On this point, both the Senate defendants and Assembly defendants agree; they disagree, however, as to what forum should move ahead on the problem. The Assembly defendants suggest that we should exercise our discretion to abstain under the principles of *Scott* v. *Germano*, 381 U.S. 407 (1965) (per curiam) and *Younger* v. *Harris*, 401 U.S. 37 (1971), thereby allowing the state court to handle the case. The Senate defendants (joined by PRLDEF), on the other hand, argue against abstention and in favor of enjoining the state court proceedings, citing our power under the All Writs Act, 28 U.S.C. § 1651.

Our task, therefore, is to determine in which court this dispute should proceed, keeping in mind "the importance and immediacy of the problem", *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965), as well as notions of "comity" and "Our Federalism" which underly the "desire to permit state courts to try state cases free from interference by federal courts." *Younger* v. *Harris*, 401 U.S. at 43-44.

III.

We are faced primarily with a practical problem. The congressional primaries are scheduled for September 15, 1992. *See* N.Y. Elec. Law § 8-100(l) (a). Under New York's Election Law, candidates for office must file "designating petitions," which require a specific number of signatures, with the state and local election boards. N.Y. Elec. Law § 6-118. These "designating petitions" must "be filed not earlier than the tenth Monday before,

and not later than the ninth Thursday preceding the primary election." N.Y. Elec. Law § 6-158(1). The "ninth Thursday preceding the primary election" this year is July 16, 1992. Moreover, "(a) signature made earlier than thirty-seven days before the last day to file designating petitions for the primary election shall not be counted," N.Y. Elec. Law § 6-134(6); thus, potential candidates may not start collecting signatures any earlier than June 9, 1992.

Furthermore, since Bronx County, Kings County, and New York County are "covered jurisdictions" under § 4(b) of the Voting Rights Act, *see* 28 C.F.R. § 51.2, any redistricting by the legislative route would be a change affecting voting which must be precleared either by the Attorney General of the United States or by a three-judge court of the United States District Court for the District of Columbia before it has legal force or effect. 28 C.F.R. § 51.9; *Clark* v. *Roemer*, 111 S. Ct. 2096, 2099 (1991). Under 28 C.F.R. § 51.9(a), the U.S. Attorney General has 60 days from submission of the proposed change to interpose an objection to the proposed plan.

Thus, if the U.S. Attorney, General takes the entire 60-day period available to him in approving any proposed redistricting plan, the State of New York will not have new, approved congressional districts in time for the signature-gathering/petitioning process to begin. In simpler terms, time is of the essence.

IV.

Abstention is a discretionary doctrine. *Harman* v. *Forssenius*, 380 U.S. at 537. In deciding whether or not to exercise our discretion, we are informed by the *Harman* Court's discussion of abstention as it relates to Voting Rights Act challenges. In addition to the fact that no disputed question of state law was raised by the case, the Supreme Court found support for the district Court's refusal to abstain

> in the nature of the constitutional deprivation alleged and the probable consequences of abstaining. The District Court was faced with two class actions attacking a statutory scheme allegedly impairing the right to vote in violation of Art. I, § 2, and the Fourteenth, Seventeenth and Twenty-fourth Amendments. As this Court has stressed on numerous occasions, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." The right is fundamental "because preservative of all rights." In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.

Harman v. *Forssenius*, 380 U.S. at 537 (citations and footnotes omitted).

Here, we are faced with even more compelling reasons not to abstain. As in *Harman*, there are no disputed questions of state law at issue, and the case involves the same fundamental deprivation involved in the *Harman* case — the denial of the constitutional and statutory right to vote in the election of federal congressional representatives. Moreover, this motion comes under more stringent time constraints than did *Harman*: approximately one month before the beginning of the signature-gathering processes mandated by New York law, roughly five months before

the primary election, and six months before the 1992 general elections.

Furthermore, adjudicating this dispute in state court increases the likelihood of delay. A decision by the state supreme court would be appealable to the supreme court's appellate division, then to the New York Court of Appeals, and only then to the United States Supreme Court. Under 28 U.S.C. § 1253, however, any order of this three-judge court which grants or denies injunctive relief would be appealable directly to the United States Supreme Court.

Finally, we note that the recent cases cited by the Assembly defendants, *e.g.*, *Members of the Calif. Democratic Cong. Delegation* v. *Eu*, ____ F. Supp. ____ (N.D. Cal. 1992), are inapposite, primarily because the federal courts that abstained did so in favor of state redistricting processes that had been substantially completed. In Eu, for instance, the California Supreme Court, exercising its original jurisdiction, had already issued a final judgment redistricting the entire state. *See also Cotlow* v. *Emison*, 112 S. Ct. 855 (1992) (vacating order of three-judge district court enjoining state court proceeding's where state court was on eve of issuing final judgment and where case involved disputed questions of state constitutional law).

"Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote." *Badham* v. *United States Dist. Court for the Northern Dist. of Cal.*, 721 F.2d 170 (9th Cir. 1983). In view of all of these considerations, we deny the motion to abstain in favor of the state proceeding.

V.

That said, and in light of the further reality that this dispute *must* be decided in one forum, we conclude that we must also

exercise our power under the All Writs Act, 28 U.S.C. § 1651, to enjoin any further proceedings in the state court action. All of the claims presented in all three cases — PRLDEF, Warina, and *Reid* — are federal constitutional and Voting Rights Act claims involving the right to vote in an election for federal congressional representatives. Since we have a "virtually unflagging" obligation to decide federal claims, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976), we conclude that an injunction of the state redistricting case is both necessary and appropriate to protect our jurisdiction. *United States* v. *International Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990). The All Writs Act, of course, gives us the power to enjoin not only parties to the action before us, but nonparties as well. *Id.*

Thus, we enjoin all counsel and parties in the action *Reid* v. *Marino*, Index no. 9567/92, now pending in the Supreme Court of the State of New York, County of Kings, from taking any further steps or proceedings in that action. Counsel for the Senate defendants are directed to serve all parties and counsel in the state-court action with copies of this memorandum and order. A courtesy copy should also be delivered to the chambers of the Supreme Court Justice presiding over the state-court action.

VI.

Plaintiff Waring's motion to return the *Waring* v. *Gantt* action to the Western District is denied in all respects.

SO ORDERED.

/s/George C. Pratt
George C. Pratt,
United States Circuit Judge

/s/John S. Martin, Jr.
John S. Martin, Jr.
United States District Judge

/s/Sterling Johnson, Jr.
Sterling Johnson, Jr.
United States District Judge

Dated: New York
May 5, 1992

MEMORANDUM

SUPREME COURT COUNTY

ASQUITH REID, ET AL.,

Plaintiff,

vs.

RALPH J. MARINO, ET AL.,

Defendant.

By Hon. Shaw,

Dated May 5, 1992

Index # 9567/92

The primary responsibility for congressional reapportionment lies with the New York State legislature. It is ony when the legislature — the Senate and/or the Assembly — have abdicated their duty by failing to enact a redistricting plan that the judiciary is called upon to assume this responsibility and to adopt a plan which will render New York's congressional delegation constitutional, that is, by reducing the number of congressional seats from 34 to 31 in accordance with the 1990 census. While both the federal judiciary and the New York State Supreme Court may have concurrent jurisdiction to act in this matter, the United States Supreme Court has indicated on several occasions their preference that the state court exercise jurisdiction over reapportionment. (*See Maryland Committee* v. *Tawes*, 377 U.S. 656 at 674 and *Scott* v. *Germano*, 381 U.S. 407 at 409). Consistent with these cases, this court which has obtained jurisdiction by virtue of the matter before it, will retain jurisdiction until a final congressional redistricting plan has been enacted by the New York State legislature and signed by the Governor or a plan has been adopted by this court and, in either case, has been approved by the Attorney General of the United States or by a U.S. District Court, District of Columbia 3 judge panel.

Pursuant to this exercise of jurisdiction, this court issued an order dated April 24, 1992 which provided that if the New York State Legislature failed to enact a 31 member of redistricting plan by May 4, 1992, the parties were to submit proposed congressional redistricting plans and accompanying supporting documents, the names of proposed expert witnesses and the names of proposed independent experts to serve as referees.

The legislature has failed to enact a Congressional redistricting plan. This Court must ensure that the regularly scheduled November 1992 congressional election is held in conformity with the applicable law, and must therefore adopt a plan which will reduce the number of New York's Congressional Districts from 34 to 31 in a manner which conforms with both state and federal constitutional mandates and the federal Voting Rights Act.

Therefore, pursuant to CPLR 4001, 4201 *et seq.* and 4311 *et seq.*, this court hereby appoints a panel of three referees to hear and report to this court. The panel shall be composed of the following persons:

Hon. Milton Mollen, [nominated by the parties]
Hon. Vincent A. DeIorio [nominated by the parties]
Hon. Philip D. Roache [designated by the court].

These referees shall assist the court in the formulation of a comprehensive reappointment plan and will, as soon as practicable, hold hearings and prepare for submission a written report containing a complete and valid re-apportionment plan for the Congressional Districts of the State of New York on or before May 26, 1992. The referees shall set forth the criteria underlying the plan they recommend for adoption and the reasons for their recommendations. The referees are hereby granted the powers necessary for the performance of their duties to hear and report in conformance with the previously cited sections of the CPLR.

Along with their report, the referee shall submit a statement of their fees and expenses.

A copy of this order shall be served by the clerk of the court upon each designated referee immediately upon the entry of this order.

This constitutes the decision and order of this Court.

ENTER,

/s/James H. Shaw, Jr.
J.S.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and EVELYN CORCHARDO, *Plaintiffs*,	:	DOCKET NO. CV-92-1521(SJ)
- against -	:	
DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RAPLH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, *Defendants*.	:	ORDER

MICHAEL T. WARING, *Plaintiff,*	:	
- against -	:	
DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe, *Defendants.*	:	DOCKET NO. 92CV1776

Johnson, District Judge:

The State Court Plaintiffs' and the Assembly Defendants' application for an order staying, pending appeal to the United States Supreme Court, that portion of the Court's May 5, 1992 Memorandum and Order enjoining all parties in the action of *Reid* v. *Marino*, Index No. 9567/92, now pending in the Supreme Court of the State of New York, County of Kings from taking any further steps or proceedings in that action, is hereby denied.

/s/ Sterling Johnson, Jr.
United States District Judge
(for the three-judge court)

Brooklyn, New York
May 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, ET AL.,	:	
Plaintiffs,	:	92 Civ. 1521 (SJ)
-against-	:	
DAVID GANTT, ET AL.,	:	
Defendants.	:	
MICHAEL T. WARING,	:	
Plaintiff,	:	92 Civ. 1776 (SJ)
-against-	:	
DAVID GANTT, ET AL.,	:	
Defendants.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiffs in the state court action entitled *Reid, et al.* v. *Marino, et al.*, Index No. 9567/92 (Sup. Ct. Kings Co.) (hereafter, the "State Court Action")—Asquith Reid, Morton M. Avigdor, Vivian Bright, Bernard Freilich, Corinna Grant, Laraine A. Grande, Lorrelle Henry, and Luis Osorio, each a voter in the State of New York; and Gary L. Ackerman, Floyd H. Flake, Nita M. Lowey, Thomas J. Manton, Major R. Owens, Charles B. Rangel, Charles E. Schumer, and Stephen J. Solarz, each individually as a voter in the

State of New York and as a Member of the U.S. House of Representatives—and defendants herein The Assembly of the State of New York, Saul Weprin, Speaker of the Assembly of the State of New York, David Gantt, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment, and the Assembly half of the New York State Legislative Task Force on Demographic Research and Reapportionment (hereafter collectively, the "Assembly Defendants"), hereby appeal to the United States Supreme Court from so much of the Memorandum and Order of the Three-Judge Court dated May 5, 1992 as enjoined all parties and counsel in the State Court Action from taking any further steps or proceedings in that action.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
May 6, 1992

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON

By: /s/ Edward N. Costikyan
Edward N. Costikyan (EC-7092)
Gerard E. Harper (GH-0279)
Andrew J. Peck (AP-4491)

1285 Avenue of the Americas
New York, N.Y. 10019-6064
(212) 373-3000

Attorneys for Plaintiffs
in the State Court Action

GRAUBARD, MOLLEN, HOROWITZ,
POMERANZ & SHAPIRO

By: /s/C. Daniel Chill
C. Daniel Chill (CDC-6940)
Elaine Reich

600 Third Avenue
New York, N.Y. 10016
(212) 818-8800

Attorneys for the Assembly Defendants

TO: Attached Service List

CERTIFICATE OF SERVICE

I, Nicole L. Felton, do hereby certify that the foregoing Notice of Appeal to the Supreme Court of the United States was served upon the parties on the attached service list in the manner specified on the attached service list on this 6th day of May 1992.

/s/Nicole L. Felton
Nicole L. Felton, Esq.

Service List

The Honorable George C. Pratt (By Fed. Ex.)
U.S. Courthouse
Uniondale Avenue at Hempstead Turnpike
Uniondale, New York 11533

The Honorable John S. Martin, Jr. (By Hand)
U.S. Courthouse
40 Foley Square
New York, New York 10007

The Honorable Sterling Johnson, Jr. (By Hand)
U.S. Courthouse
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Arthur A. Baer, Esq. (By Hand)
Puerto Rican Legal Defense and
Education Fund
99 Hudson Street
New York, New York 10013
(Counsel for plaintiffs)

Joel Graber, Esq. (By Hand)
Assistant Attorney General
120 Broadway
New York, New York 10271
(Counsel for defendants Cuomo,
Lundine and the Board of Elections)

C. Daniel Chill, Esq. (By Hand)
Graubard, Mollen, Horowitz, Pomeranz
& Shapiro
600 Third Avenue, 33rd Floor
New York, New York 10016-1903
(Counsel for defendants Saul Weprin,
David Gantt and the New York State Assembly)

Gregg M. Mashberg, Esq. (By Hand)
Proskauer Rose Goetz & Mendelsohn
1585 Broadway
New York, New York 10036
(Counsel for defendants Marino, Skelos and the New York State Senate)

Charles J. Cooper, Esq. (By Fed. Ex.)
Shaw, Pittman, Potts & Trowbridge
2300 N. Street, N.W.
Washington, D.C. 20037
(Counsel for defendants Marino, Skelos and the New York State Senate)

Defendant The New York State Board of Elections (By Mail)
Commerce Plaza
P.O. Box 4
Albany, New York 12260

Eugene F. Pigott, Jr., Esq. (By Mail)
Offerman, Mahoney, Cassano, Pigott, Greco & Whalen
1776 Statler Towers
Buffalo, New York 14202
(Counsel for plaintiff Michael T. Waring)

Ronald Starkweather (By Mail)
Commissioner of the Board of Elections
County of Monroe
39 West Main Street
Rochester, New York 14614

M. Betsy Relin (By Mail)
Commissioner of the Board of Elections
County of Monroe
39 West Main Street
Rochester, New York 14614

Stanley Kalmon Schlein, Esq. (By Hand)
Whitman & Ransom
200 Park Avenue
New York, New York 10166
(Counsel for Intervenor Nita Lowey)

Paul Wooten, Esq. (By Mail)
214 Jefferson Avenue
Brooklyn, New York 11216
(Counsel for Intervenors
Congressman Major R. Owens, Karl B. Morgan
and Penelope Fujiko Willgrodt)

Judith Reid, Esq. (By Hand)
NAACP Legal Defense and Education
Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(Counsel for Intervenors NYS African-American
Political Action Committee, Linda Breckenridge,
Isaiah Thomas, Mary Murphy, Leroy Sawyer and
Vivian Bright)

Nathan Lewin, Esq. (By Mail)
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Washington, D.C. 20037
(Counsel for Intervenors Council of Jewish
Organizations of Boro Park, United Jewish
Organizations of Williamsberg, Rabbi Bernard
Freilich and Adam Veneski)

David A. Barrett, Esq. (By Hand)
Duker & Barrett
90 Broad Street
New York, New York 10004

Boyle, Shea, Nornes & Pines (By Mail)
1393 Veterans Memorial Highway
Hauppauge, New York 11788

FILED
JUN 17 1992
OFFICE OF THE CLERK

No. 91-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID GANTT, *et al.*,

Appellants,

—v.—

DEAN SKELOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF THE TRIAL COURT

RUBEN FRANCO
ARTHUR A. BAER*
KENNETH KIMERLING
Puerto Rican Legal Defense
and Eduation Fund, Inc.
99 Hudson Street—14th Fl.
New York, New York 10013
(212) 219-3360

Attorneys for Plaintiffs-Appellees Puerto Rican Legal Defense and Education Fund, Inc. and Evelyn Corchado

* Counsel of Record

TABLE OF CONTENTS

		Page
TABLE OF CONTENTS		i
TABLE OF AUTHORITIES		ii
I.	PRELIMINARY STATEMENT	1
II.	STATEMENT OF THE CASE AND PROCEEDINGS BELOW	3
	A. Background	3
	B. The Proceedings Below	4
	C. Decision Below	10
	D. Actions Subsequent To The May 5, 1992 Order	14
III.	ARGUMENT	16
	APPELLANTS RAISE NO SUBSTANTIAL ISSUES	16
	Introduction	16
A.	PRLDEF PLAINTIFFS ARE ENTITLED TO THEIR CHOICE OF A FEDERAL FORUM	21
	1. The State Court Has No Legislative Or Administrative Role In Redistricting And There Is No State Interest In Maintaining A State Forum To Adjudicate Federal Claims	24

2. The Potential Impact Of Delay On the Right To Vote Precluded Abstention..... 28

3. Younger And Burford Abstention Were Inapplicable..... 47

B. THE STATE ACTION WAS PROPERLY ENJOINED UNDER THE AUTHORITY CONFERRED BY THE ALL WRITS ACT..... 52

1. The District Court Did Not Abuse Its Discretion By Staying The State Court Proceeding..... 52

2. There Is No Statutory Prohibition In Entering Injunctive Relief Staying Pending State Court Proceedings..... 55

CONCLUSION..... 62

TABLE OF AUTHORITIES

Page

Cases

Alliance of America Insurers v. Cuomo, 854 F. 2d 591 (2d Cir. 1988).....48,49

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)..... 52

Badham v. United States Dist. Court for the Northern Dist. of Cal., 721 F.2d 1170 (9th Cir 1983)....12,29,30,32,50

Bianchi v. Griffing, 393 F.2d 457 (2d Cir. 1968).....28,29,40

Burford v. Sun Oil Company, 319 U.S. 315 (1943).....19,47,50,51

Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983)..... 29

Colorado River Water Conversation Dist. v. United States, 424 U.S. 800 (1976)..... 14,26

County of Allegheny v. Mashuda, 360 U.S. 185 (1959)..... 22

Dillard v. Crenshaw County, 640 F. Supp. 1347 (M.D. Ala. 1986)..... 61

Doran v. Salem Inn, 422 U.S. 922 (1975)..... 48

Edwards v. Sammons, 437 F.2d 1240 (5th Cir. 1971)..... 29,31

Emison v. Growe, 782 F. Supp. 427 (D. Minn. 1992) stayed, in part, by order of Justice Blackmun (March 11, 1992), prob. juris. not 60 U.S.L.W. 3669 (U.S. March 31, 1992).....passim

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).....21,27,28

Harman v. Forssenius, 380 U.S. 537 (1965).....passim

Harris v. Graddick, 593 F. Supp. 128 (M.D. Ala. 1984).....48,61

Hathorn v. Lovorn, 457 U.S. 255 (1982)..... 37

Ince v. Rockerfeller, 290 F. Supp. 878 (S.D.N.Y. 1968)..... 46

Mahoney v. Burkhardt, 299 F. Supp. 787 (D.N.J. 1969)..... 46

Members of the Calif. Democratic Cong. Delegation v. Eu, ____ F. Supp. ___ (N.D. Cal. 1992).....11,28

Mitchum v. Foster, 407 U.S. 225 (1972)..... 56

Montana v. United States, 440 U.S. 147 (1979)..... 27

Moses H. Cone Hospital v. Mercury Constr., 460 U.S.1 (1983).....22,23

New Orleans Pub. Serv. (NOPSI) v. New Orleans, 491 U.S. 350 (1989)....24,25

Penn General Casualty v. Pennsylvania ex rel. Schnader, 194 U.S. 189 (1935)..... 53

Reid, et al. v. Marino, et al., No. 9567192 (N.Y. Supp. Ct.).....passim

Reynolds v. Sims, 377 U.S. 533 (1964)..... 61

Ryan v. State Board of Elections, 661 F.2d 1130 (7th Cir. 1981)..... 51

Scott v. Germano, 381 U.S. 407 (1965)..... 28

Silver v. Jordan, 263 F. Supp. 627 (C.D. Cal. 1966)..... 47

Skolnick v. State Electoral Bd. of Illinois, 336 F. Supp. 839, (N.D. Ill. 1971).....28,31,32,39

Sullivan v. City of Pittsburgh, P.A., 811 F.2d 171 (3rd Cir.) cert. denied.....38,48

Voinovich, et al. v. Quilter, et al., 60 U.S.L.W. 3809, prob. juris. not. (U.S. June 2, 1992)..... 47

Wesch v. Hunt, Slip. Op., Civ. No. 91-0787 (S.D. Ala. March 9, 1992), aff'd mem. sub. nom. Camp v. Wesch, 60 U.S.L.W. 3768 (U.S. May 19, 1992).....33,35

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 864 (2d Cir. 1988)..... 55

Younger v. Harris, 401 U.S. 37 (1971).....passim

Zwickler v. Koota, 389 U.S. 241 251-52 (1967)..... 26

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1651..... 54

28 U.S.C. § 2283..... 55

42 U.S.C. § 1973.....passim

42 U.S.C. § 1973c..... 36

42 U.S.C. § 1973 1(b).....36,37

42 U.S.C. § 1983.....passim

U.S. Const. Amend XIV..... 6

U.S. Const. Amend XV..... 6

OTHER AUTHORITIES

17A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, § 4243 (1977)..... 18

C. Wright and A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973)..... 61

Appellees Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) and Evelyn Corchado, plaintiffs in Puerto Rican Legal Defense and Education Fund, Inc., et al. v. Gantt, et al., Civil Action No. 92-1521 (SJ) (E.D.N.Y.) (hereinafter PRLDEF plaintiffs or Appellees), move the Court to dismiss the appeal herein or, in the alternative, affirm the unanimous judgment of the United States District Court for the Eastern District of New York on the ground that the questions presented are so insubstantial as not to need further argument.

I.

PRELIMINARY STATEMENT

At the time of the filing of this appeal, at issue was the power of a three-judge federal court to enjoin a parallel

State court proceeding when both courts would potentially engage in the process of redrawing New York State's congressional districts. Circumstances have changed since that time that make this case an inappropriate vehicle to address this issue. On June 11, 1992, the Governor of New York signed a congressional redistricting plan passed by the New York State Legislature. The Governor's action effectively moots the State court proceeding. Plaintiffs in the State court proceeding challenged the current districts solely on the grounds that the current districts failed to meet the one-person, one-vote requirements. Because the newly adopted plan complies with one-person, one-vote requirements, these claims are extinguished and the case is moot. Thus, the conflict originally presented by the injunction issued below

no longer exists: The State court proceedings have been effectively closed.

For the reasons stated below, even if the State court proceedings were not moot, the Court should dismiss appellant's appeal, or affirm the order of the district court.

II.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

A. Background

In early 1991, 1990 census data reflecting demographic changes in the United States and in New York State was made available. There was no dispute that New York's congressional districts had to be redrawn. New York State's population had grown at a rate relatively slower than other states. Consequently, New York State was required to reduce its number of congressional seats from 34 to

31. Yet, at the inception of this litigation at the end of March, 1992, the Legislature had not acted to redraw the State's congressional districts. It had not complied with its own redistricting schedule, which had been adjusted at least four times, each time delaying the date for recommendation of a statewide redistricting plan. An apparent legislative impasse had been reached.

Yet, on June 9, 1992, the candidate petitioning process for congressional seats was scheduled by statute to begin. Reasonable time for the State actors to adopt a reapportionment plan had expired.

B. The Proceedings Below

On March 26, 1992, as a consequence of the Legislature's inaction and the impending candidate qualification period, actions were filed in both State and

federal court. The State court action, Reid et al. v. Marino, et al., No. 9567-92, was filed in the Supreme Court of New York for the County of Kings by eight individuals who are alleged to be residents and voters in Kings County, New York, plus seven incumbent Members of the U.S. House of Representatives. The federal action, Waring v. Gantt, et al., No. 92 CV-6134-T, was filed in the United States District Court for the Western District of New York by an alleged resident and voter of New York State's 32nd Congressional District.

A third action PRLDEF v. Gantt was filed on March 31, 1992. At the same time PRLDEF plaintiffs moved by order to show cause for a preliminary injunction. Until that day, no party in either the Waring or Reid actions had sought any injunctive relief. On March 31, 1992, the State

court plaintiffs in Reid (hereinafter State court plaintiffs or Appellants) also sought injunctive relief pursuant to an order to show cause.

PRLDEF plaintiffs, and only PRLDEF plaintiffs, alleged that the New York's existing congressional map denied Latino voters their right to vote in violation of the Voting Rights Act of 1965, as amended, and the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. PRLDEF Complaint, at paragraphs 52 and 53 (hereinafter Pl. Comp.).

They, more specifically, alleged that New York State's existing congressional districts diluted Latino voting strength in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Under the "totality of circumstances" test of section 2, all the elements were present

to establish a section 2 violation. As a remedy for such violation, PRLDEF plaintiffs sought congressional districts in which Latino voters would have an equal opportunity to elect representatives of their choice. Id. at pars. 36-44, 51.

Thus, PRLDEF plaintiffs' claims reflected the unquestioned federal interest of protecting the voting rights of Latino citizens. No other party to any of the pending actions was similarly asserting those interests when PRLDEF plaintiffs filed their action on March 31, 1992.

Neither the Reid or Waring plaintiffs alleged any violation of the Voting Rights Act, nor did they claim that the voting rights of Latino citizens of New York State were violated by the retention of the State's existing Congressional districting scheme and the failure of the

Legislature to create new Latino districts.

On April 1, 1992, an order to show cause was signed by the United States District Court for the Eastern District of New York setting a hearing on PRLDEF plaintiffs' motion on April 7, 1992.

On that date, the three judge panel of the United States District Court for the Eastern District of New York entered an order directing the parties to submit their recommendations for congressional redistricting plans by April 27, 1992, allowing other interested parties to intervene and submit their own plans by May 4, 1992, and denying any motion for abstention, to the extent raised. The panel entered no injunction against the New York State Legislature prohibiting it from creating a congressional redistricting plan. To the contrary, the

Court chose to not even set a date certain by which the Legislature was required to act. On April 9, 1992 a three judge panel of the United States district court for the Western District of New York transferred the Waring action to the Eastern District of New York, where it was consolidated with the PRLDEF action.

Meanwhile, in the State court proceeding, the New York State Senate (hereinafter Senate Defendants), on April 7, 1992, filed a notice removing the State court action to federal court. However, on April 17, 1992, the federal court granted the State Court plaintiffs' remand motion.

Unsuccessful in their removal of the State proceedings, the Senate Defendants moved to enjoin the State Court proceedings. A cross motion was filed by defendants Gantt, the New York State

Legislative Task Force on Demographic Research and Reapportionment, Weprin, and the Assembly of the State of New York (hereinafter Assembly Defendants or Appellants) who moved to dismiss, or alternatively to stay the PRLDEF proceedings on grounds of abstention.

C. DECISION BELOW

On May 5, 1992, the three judge panel unanimously denied the motion to dismiss or abstain, and unanimously granted the motion to enjoin the State court proceedings. It held because of exigent circumstances and the potential harm to plaintiffs' voting rights which would result from the further delay attendant in State court proceedings, it would not abstain. The district court, relying on Harman v. Forssenius, 380 U.S. 537 (1965), stated:

Here, we are faced with even more compelling reasons not to abstain. As in Harman, there are no disputed questions of state law at issue, and the case involves the same fundamental deprivation involved in the Harman case - the denial of the constitutional and statutory right to vote in the election of federal congressional representatives. Moreover, this motion comes under more stringent time constraints than did Harman: approximately one month before the beginning of the signature-gathering processes mandated by New York law, roughly five months before the primary election, and six months before the 1992 general elections.

Furthermore, adjudicating this dispute in state court increases the likelihood of delay. A decision by the state supreme court would be appealable to the supreme court's appellate division, then to the New York Court of Appeals, and only then to the United States Supreme Court. Under 28 U.S.C. § 1253, however, any order of this three-judge court which grants or denies injunctive relief would be appealable directly to the United States Supreme court.

Finally, we note that the recent cases cited by the Assembly defendants, e.g., Members of the Calif. Democratic Cong. Delegation v. Eu, _____ F. Supp. ____ (N.D. Cal. 1992), are inapposite, primarily because the federal courts that

abstained did so in favor of state redistricting process that had been substantially completed. In Eu, for instance, the California Supreme Court, exercising its original jurisdiction, had already issued a final judgment redistricting the entire state. See also, Cotlow v. Emison, 112 S. Ct. 855 (1992) (vacating order of three-judge district court enjoining state court proceeding's where state court was on eve of issuing final judgment and where case involved disputed questions of state constitutional law).

"Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote." Badham v. United States Dist. Court for the Northern Dist. of Cal., 721 F.2d 1170 (9th Cir 1983). In view of all of these considerations, we deny the motion to abstain in favor of the state proceeding.

[Slip Op. at 6-7].

In enjoining the State court proceedings, the Court without discussing the Anti-Injunction Act, but recognizing PRLDEF plaintiffs' federal constitutional

and Voting Rights Act claims, held that because there could only be one set of lines and two courts redistricting the State would be wasteful, as well as confusing, it would enjoin the State court proceedings. The Court stated:

> The three pending cases can ultimately result only in a single approved congressional redistricting plan for New York State. Consequently, these issues must be resolved in a single forum; two courts simultaneously attempting to redistrict the state would be wasteful, unnecessarily confusing, and inefficient. On this point, both the Senate defendants and Assembly defendants agree; they disagree, however, as to what forum should move ahead on the problem.
>
> . . . .
>
> [I]n light of the .... reality that this dispute must be decided in one forum, we conclude that we must also exercise our power under the All Writs Act, 28 U.S.C. § 1651, to enjoin any further proceedings in the state court action. All of the claims presented in all three cases - PRLDEF, Waring, and Reid - are federal constitutional and Voting Rights Act claims involving the right to vote in an election for federal

> congressional representatives. Since we have a "virtually unflagging" obligation to decide federal claims, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976), we conclude that an injunction of the state redistricting case is both necessary and appropriate to protect our jurisdiction. United States v. International Bd. of Teamsters, 907 F.2d 277, 281 (2d Cir. 1990). The All Writs Act, of course, gives us the power to enjoin not only parties to the action before us, but nonparties as well. Id.

[Slip Op. at 4, 7-8].

This is the injunction which is now an appeal.

D. Actions Subsequent To The May 5, 1992 Order

By May 12, 1992, no congressional redistricting plan was passed by the New York State Legislature. Consequently, the district court entered an order on May 12, 1992 appointing a Special Master to undertake the reapportionment of New York State's 31 congressional districts.

On May 26, 1992, the Special Master submitted his plan to the court. That plan creates seven minority districts, three of which are Latino. Each of the Latino districts have voting age populations of 55% or greater and each is a viable districts.

In the State court Reid proceedings, only two Latino majority districts were created by the appointed State court referee in a plan released on June 1, 1992. In PRLDEF plaintiffs' view the State court plan violates sections 2 and 5 of the Voting Rights Act with respect to Latino voters.

On June 11, 1992, the Governor of New York signed a redistricting plan passed by the New York State Legislature, mooting the State court proceeding. On that same day, the federal court entered an order adopting and approving the Special

Master's plan and ordering that it be used for the 1992 congressional elections, if the State plan was not precleared by July 8, 1992.

III.

ARGUMENT

APPELLANTS RAISE NO SUBSTANTIAL ISSUES

Introduction

There are no substantial issues raised by this appeal. Appellants' argument is premised on the extraordinary and erroneous assertion that state courts, gua courts, have primacy over federal courts in the adjudication of, and choice of forum for, federal civil and voting rights claims. This is sheer nonsense.

The district court did not abuse its discretion when it rightly rejected appellants' abstention motion and entered

an injunction enjoining any further state court proceeding. Long standing precedent of this Court makes it clear the federal courts have primacy over state courts in adjudicating federal claims, especially civil rights claims. Once the district court appropriately refused to abstain, it had no choice but to enter an injunction to effectuate an appropriate remedy. Appellants concede that liability had been established with respect to one-person, one-vote claims; thus, the federal court's actions to draw congressional districts was the remedial stage of the litigation. Appellants also recognize in their jurisdictional statement that it is appropriate for a federal court to enjoin a State court proceeding in order to effectuate an appropriate remedy. There could only be one remedy, one set of new lines, and the federal court was the

appropriate court to provide this remedy for these violations of federal law.

At the heart of the appellants' appeal is their claim - that if one court is to be responsible for providing a remedy for legislature's inaction, it should be the State court. They argue that, even with only one month remaining before the start of the election process, the federal court should have abstained.

Appellants' argument is based on an erroneous premise. As an initial matter, the federal courts refusal to abstain is not appealable as an interlocutory order and is not now before this Court.[1] Equally important, as is demonstrated below, the district court's decision to exercise its primacy over the State court

---

[1] See 17A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, § 4243 (1977).

is in full accord with established precedent of this Court. First, this Court has consistently held federal courts, gua courts, have primacy over State courts in the adjudication of federal claims. Second, this Court and others have held that federal courts should not relinquish their jurisdiction and defer the adjudication of claims based on the fundamental rights to vote; where, as here, delay would have a potential impact on that fundamental right to vote. Third, Burford and Younger abstention did not apply here.

Thus, the abstention precedents of this Court fully support trial court's decision to retain jurisdiction and thus, provide relief. These decisions confirm the primacy of the federal court over state courts in resolving the federal claims presented here. Appellants'

assertion of the comity interest in having the State court provide a remedy for federal law violations is inconsistent with these precedents.

Having properly decided not to abstain, the federal court's decision to enjoin the State court proceedings under the All Writs Act was appropriate and fully within its discretion. The Court acted to protect the efficacy of the relief that it was providing for admitted violations of the United States Constitution.

Contrary to appellants' arguments, strong precedents of this Court support the district court's action. Their reliance on the Anti-Injunction Act is totally misplaced as this Court has held that the Act does not apply to constitutional claims.

A. PRLDEF PLAINTIFFS ARE ENTITLED TO THEIR CHOICE OF A FEDERAL FORUM

It is general principle of federal law that a plaintiff who properly invokes the jurisdiction of the federal court to adjudicate federal claims should not be divested of that jurisdiction. As this Court in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) explained:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it is its duty to take such jurisdiction.... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

> Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, 53 L ed 382, 394, 29 S. Ct. 192, 48 LRA NS 1134.

375 U.S. at 415 (footnote omitted).

Here, PRLDEF plaintiffs had clearly asserted federal claims and were thus entitled to adjudicate their claims in federal court, unless there was a basis for the federal court to abstain.

"The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy before it." County of Allegheny v. Mashuda, 360 U.S. 185, 188 (1959); Moses H. Cone Hospital v. Mercury Constr., 460 U.S. 1, 14 (1983). Abdication of the obligation of the District Court to adjudicate the controversy properly before it "can be justified only in the exceptional

circumstance where the order to the parties to repair to the State court would clearly serve an important countervailing interest." Mashuda, 360 U.S. at 188-189. The "task in such cases is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that... justify the surrender of that jurisdiction." Moses H. Cone Hospital, 460 U.S. at 25-26 (emphasis in original). The fact that federal law provides the rule of decision on the merits is a factor that counsels against abstention. Id. at 23-26.

Here, the*re did not exist the "exceptional" circumstances and the "clearest of justifications" necessary to divest plaintiffs of their chosen federal

forum.

1. The State Court Has No Legislative Or Administrative Role In Redistricting And There Is No State Interest In Maintaining A State Forum To Adjudicate Federal Claims

Appellants argue strenuously that the New York State Supreme Court is a State agency with primacy over the federal court in fashioning redistricting plans. Jurisdictional Statement (hereinafter "Jur.") at 20. Unlike some State courts the New York courts play no administrative or legislative role in redistricting. They merely function as judicial tribunals. The only special deference given to State courts as a forum is where there are State law questions or where a federal courts' actions would interfere with a State court's actual judicial functions, such as, e.g., interfering with a State court's contempt order. See New

Orleans Pub. Serv. (NOPSI) v. New Orleans, 491 U.S. 350 (1989).

Here, the argument made for abstention by appellants is precisely the argument rejected by the Court in NOPSI. In NOPSI the appellees argued the district court properly abstained, where a Louisiana Court action was asserted to be part of a State entities ongoing ratemaking proceedings. 491 U.S. at 368. The Court rejected the argument "[s]ince the State-court review [was] not an extension of the legislative process." 491 U.S. at 372. In reaching its decision, the Court explained:

> Although our concern for comity and federalism has led us to expand the protection of Younger beyond state criminal prosecutions, to civil enforcement proceedings involving certain orders that are uniquely in furtherance of the State court's ability to perform their judicial function, it has never been suggested that Younger requires abstention in deference to a state judicial

> proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States. Colorado River Water Conservation District v. United States, 424 U.S. [800], at 817 [1976].

[491 U.S. at 367-68, emphasis added; citations partially omitted].

The Court further explained:

> It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes preempt, a future or,... even a pending State court action. But there is no doctrine that the availability or even the pendency of State judicial proceedings excludes the federal courts.

491 U.S. at 373.

Abstention is, moreover, has consistently been rejected as appropriate where there are, as here, federal civil rights claims and the mere assertion of a comity interest in a State forum, qua forum. As stated by the Court in Zwickler

v. Koota, 389 U.S. 241, 251-52 (1967).

> In Turner v. City of Memphis, 369 U.S. 350, 7 L. ed. 2d 762, 82 S. Ct. 805 (per curiam), we vacated an abstention order which had been granted on the sole ground that a declaratory judgment action ought to have been brought in the state court before the federal court was called upon to confer the constitutionality of a statute alleged to be violative of the Fourteenth Amendment. In McNeese v. Board of Education, 373 U.S. 668, 10 L. ed. 2d 622, 83 S. Ct. 1433, we again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. After examining the purposes of the Civil Rights Act, under which that action was brought, we concluded that "[w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U.S. at 672, 10 L. ed 2d at 625. For the "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415-416, 11 L. ed. 2d 440, 444, 445, 84 S. Ct. 461.

See also, Montana v. United States, 440 U.S. 147, 163 (1979) ("As we held in

England, abstention doctrine may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions.").

2. The Potential Impact Of Delay On the Right To Vote Precluded Abstention

While the State has an interest in reapportioning its Congressional seats; see e.g., Scott v. Germano, 381 U.S. 407 (1965); Bianchi v. Griffing, 393 F.2d 457 (2d Cir. 1968); Members of the California Democratic, et al. v. Eu, Slip. Op., Civ. No. 91-3383 FMS (D. Cal. March 3, 1992) (three judge court) (2-1 decision); that interest becomes subordinate to the countervailing federal interests of voting rights plaintiffs when the State has so delayed asserting its interests as to potentially impair plaintiffs' rights;

Harman v. Forssenius, 380 U.S. 528 (1965); Badham v. U.S. Dist. Ct. For N. Dist. of Cal., 721 F.2d 1170 (9th Cir. 1983); Edwards v. Sammons, 437 F.2d 1240 (5th Cir. 1971); Emison v. Growe, 782 F. Supp. 427, 431-434 (D. Minn. 1992) (three judge court), stayed, in part, by order of Justice Blackmun (March 11, 1992), jurisdiction noted, 60 U.S.L.W. 3669 (March 31, 1992); Cavanagh v. Brock, 577 F. Supp. 176, 180 n.4 (E.D.N.C. 1983) (three judge court); Skolnick v. State Electoral Bd of Illinois, 336 F. Supp. 839, 869-871 (N.D. Ill. 1971) (three judge court). As explained by the Harman Court:

> As this Court has stressed on numerous occasions, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government." Reynolds v. Sims, 377 U.S. 533, 555, 12 L. ed. 2d 506, 523, 84 S. Ct. 1362. The right is fundamental "because preservative of

> all rights." Yick Wo v. Hopkins, 118 U.S. 556, 370, 30 L. ed. 220, 226, 6 S. Ct. 1964. In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent to referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain. Griffin v County School Board of Prince Edward County, 377 U.S. 218, 229, 12 L. ed. 2d 256, 264, 84 S. Ct. 1226; Baggett v Bullitt, 377 U.S. 360, 375-379, 12 L. ed. 2d 377, 387-389, 84 S. Ct. 1316.

380 U.S. at 537 (emphasis added); see also Badham 721 F.2d at 1172-73 ("The dangers posed by an abstention order are particularly evident in voting cases.... We... hold that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order

will have on the plaintiff's right to vote. Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote."); Edwards, 437 F.2d 1240; Emison, 782 F. Supp. at 431-434; Brock, 577 F. Supp. at 180 n.4; Skolnick, 336 F. Supp. at 869-871.

At the time the district court denied appellants' motion for abstention, the potential irreparable impact of further delay on PRLDEF plaintiffs' right to vote was immediate - only four weeks remained prior to the commencement of the candidate qualification period. E.g., Harman, 380 U.S. at 537 (no abstention two months prior to deadline for meeting statutory requirements which impact on right to

vote); Skolnick, 336 F. Supp. at 871, (restraining further proceeding in State court four to five weeks prior to due date for nominating petitions).

If petitioning was commenced based on the State's existing discriminatory congressional lines, PRLDEF plaintiffs would have been irreparably harmed. In addition, further delay in establishing constitutionally acceptable congressional districts would also have resulted in irreparable harm to Latino voters and potential Latino candidates who because of delay had no way of assessing either who to support or whether to run for office. Cf., Badham, 721 F.2d at 1173 (Delay in redistricting cases is particularly insidious. "[O]fficials may acquire advantages of incumbency that may be difficult for their opponents to overcome in future elections.").

Refusing to abstain and ordering injunctive relief to prevent the irreparable injury to the voting rights of PRLDEF plaintiffs is squarely supported by the Court's summary affirmance in Wesch v. Hunt, Slip. Op., Civ. No. 91-0787, (three judge court), (S.D. Alabama March 9, 1992) aff'd mem. sub nom. Camp v. Wesch, 60 U.S.L.W. 3768 (U.S. May 19, 1992). The United States District Court in Wesch, on March 9, 1992, adopted a statewide congressional redistricting plan for Alabama. The Alabama Legislature had passed a congressional redistricting plan prior to the rendering of the district court's decision, but that plan had not yet been precleared. Slip. Op. at 9-10, par. 22. The district court entered an order which required that its adopted plan be used for the 1992 congressional elections unless "the Alabama Legislature

duly [enacted] a redistricting plan for the conduct of congressional elections in 1992 and [had] the same precleared no later than 12:00 noon, Central Time, March 27, 1992." Thus, the district court effectively established a trigger date for the implementation of its plan that was one week before the qualifying deadline for candidates.

The district court reasoned that "at a minimum, district lines should become fixed one week prior to the April 3, 1992 qualifying date for candidates to allow both candidates and election officials the necessary time to evaluate them and choose their future conduct accordingly." Slip. Op. at p. 21, par. 46. It further reasoned that while it did not have to preclear its interim plan, "[i]n order for a legislatively-enacted congressional redistricting plan to receive the

'preclearance' from the Justice Department required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973, in time for the April 3rd qualifying deadline, such plan should have been submitted to the Justice Department no later than February 3, 1992." Id. at p.7, par. 15. It further noted that it was, because of one-person, one-vote requirements, "bound by the Constitution not to permit these elections under the present districts. Slip. Op. at p.14, par. 35.

The posture of this case, at the time of the May 5, 1992 order, was analogous to the Wesch case. The deadline for the commencement to the candidate qualification process was June 9, 1992. Candidates should have at least one week prior to that date to evaluate and choose their future conduct. Here, the legislature, of course, had not even

passed a plan; consequently, it wasn't even near meeting the preclearence requirements that New York State redistricting plans are subject to.

Forcing litigation into the New York Court system would have likely resulted in extensive delay. The State court proceedings would be subject to two levels of appeal, including an intermediate level of appeal which could redetermine factual findings (N.Y.C.P.L.R. § 5501(c)) and ending with an appeal to this Court. Even after review by this Court, the plan would be subject to preclearance. 42 U.S.C. § 1973c.[2]

---

[2] It is the position of the United States Department of Justice that a redistricting plan developed by a State court must be precleared. It is also consonant with the exclusive jurisdiction of the District Court of the District of Columbia to determine whether a plan is discriminatory under § 5 standards. 42 U.S.C. §§1973c and 42 U.S.C. §1973 1(b) [Section 14(b) of the Act] ("No court other than the District of Court for the District of Columbia.... shall have

Thus, the district court's refusal to abstain was entirely consistent with established precedent, considering the exigencies of the circumstances and the

---

jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this....title"); see also Hathorn v. Lovorn, 457 U.S. 255, 271 (1982) (Rehnquist, J., dissenting) ("Congress did not intend the State courts to play a role in the enforcement of the Act;" exclusive federal-court jurisdiction is favored, "I do not understand the Court to contend otherwise"); see also, id., 457 U.S. at 265 (court majority) (section 14(b) of the Act "governs.... declaratory judgments approving proposed changes in voting procedure") (emphasis added).

When a federal court because of exigent circumstances, fashions its own redistricting plan, it must determine that § 5 standards are met. See 1975 Sen. Rep. at 18-19. When it does so, the court is effectively sitting in the place of the Attorney General of the United States, or a District Court for the District of Columbia. This is the only exception to section 14(b) of the Act in the Act's legislative history. The New York Supreme Court has no jurisdiction to determine whether section 5 standards have been met, and thus, was requested to submit its plan to the Attorney General or a three-judge panel of the United States District Court for the District of Columbia.

potential impact on PRLDEF plaintiffs' fundamental right to vote.

The district court's decision was also consistent with the decisions of other courts, which in deciding whether to abstain based on the potential impact of delay on federal plaintiffs' voting rights, considered the length of time that State proceedings may take. See, Emison, 782 F. Supp. at 422; Brock, 577 F. Supp. at 180 n.4.

Moreover, abstention would have in practice forced PRLDEF plaintiffs to either intervene in the State litigation or forego litigating their federal rights. Such a ruling is plainly inequitable. Cf., Sullivan v. City of Pittsburgh, P.A., 811 F.2d 171, 178 n.7 (3rd Cir. 1987), cert. denied, 484 U.S. 849 (1987) ("[A] rule that permits a conclusion of identity for [abstention] purposes from the mere

possibility of permissive intervention in state proceedings allows a state litigant to dictate choice of forum for all potential intervenors based solely on a limited common interest, without regard to identity, economic control, preferred litigation strategy and ultimate litigation goals.").

Appellants' arguments that the decisions of the courts in Germano, Bianchi, Eu and Emison require abstention are also without merit. In Germano, this Court held that the district court should have abstained its proceeding after a state proceeding had been commenced, when there was approximately nine months to redistrict before the next election. See Germano, 381 U.S. 407; Skolnick, 336 F. Supp. at 371. Even then the Germano Court ordered that:

> The case [be] remanded with

> directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election of the members of the State...
>
> The District Court shall retain jurisdiction of the case and in the event a valid reapportionment plan is not timely adopted it may enter such orders as it deems appropriate, including an order for a valid reapportionment plan for the State Senate....

[381 U.S. at 409-410 (emphasis added)].

Here, by May 5, 1992, reasonable time for the State actors to adopt a reapportionment plan had already expired, and it was appropriate for the district court to proceed to adopt a valid reapportionment plan.

The court in Bianchi without addressing the immediacy of the needed reapportionment, entered an essentially

identical order to that in Germano. See, 393 F.2d at 461.

In Eu a three judge federal court in California abstained from further adjudicating plaintiffs' claims, in an opinion dated March 3, 1992. This abstention, however, was subsequent to an opinion of the California Supreme Court rendered on January 27, 1992, which had adopted a redistricting plan proposed by appointed masters, and subsequent to the preclearance of that plan by the United States Department of Justice (by letters dated February 19 and 28, 1992).

In contrast here, the State actors were nowhere near timely completion and preclearance of a redistricting plan, and a lengthy State appellant review process and a federal preclearance process awaited any determination by the State trial court.

Similarly, the decision in Emison, supra, 782 F. Supp. 427, does not argue in favor of abstention. Emison to the contrary argues against abstaining here. First, the district court in Emison never abstained. The three judge court proceeded to adjudicate plaintiffs' federal voting rights claims and the constitutionality of Minnesota's congressional and state legislative districts, after unanimously denying a motion to abstain pending the outcome of State court proceedings. 782 F. Supp. at 431, 431 & n.17. In unanimously denying the motion to abstain in August, 1991, the court reasoned that, as here, "the federal complaint contained issues relating to the Voting Rights Act, whereas the State court action... did not." Id. at 432 n.17. It further reasoned that: "In refusing to send the minority plaintiffs to state

court [it] adhered to fundamental principles governing abstention in voting rights cases." Id.

Second, while this Court vacated the Emison court's injunction of concurrent State court proceedings, this Court acted only after the State court had already adopted a state legislative redistricting, and the state legislature, given an opportunity to act, failed to enact a redistricting plan itself.[3]

---

[3] In November, 1991, the State district court had issued a state legislative redistricting plan. Id. at 432-433. The State court, declared, however, that it would not implement its plan if the legislature passed a redistricting plan in January, 1992. Id. at 433.

On December 5, 1991, the federal court enjoined all further state proceedings based on its apprehension about the apparent finality of the State court proceedings at that time, and its belief that meaningful review of the federal voting rights claims asserted only in the federal proceeding, would be prevented. Id.

Third, the Emison district court, after this Court had vacated its injunction, proceeded to adjudicate the federal plaintiffs' claims and adopt maps for Minnesota's state legislative and congressional seats. On February 19, 1992, the federal court entered an order adopting a state legislative plan and a congressional plan. It further ordered that defendant Growe, the Minnesota Secretary of State, to conduct elections only in accordance with these plans. 782 F. Supp. at 448-449.

Fourth, Justice Blackmun of this

On January 9, 1992, essentially the same state legislative districting plan as was adopted by the State court, was passed by the legislature, but vetoed by the Governor. Id. On January 10, 1992, the United States Supreme Court vacated the federal court's order of December 5, 1991, lifting the injunction on the State court parties and dissolving the stay as to the State court orders. Id. at 434 n.26.

Court, refused to stay the February 19, 1992 order entered by the federal district court with respect to the Congressional plans, even though the State court entered an order stating it would release its congressional plan if the injunction was lifted. Justice Blackmun only stayed the district court's injunctive order with respect to state legislative districts, and this was only <u>after</u> the State court had already adopted a plan.[4] Thus,

---

[4] The State court had issued a procedural order on March 3, 1992, indicating that it was fully prepared to release a congressional plan if the federal injunction was lifted.

On March 6, 1992, the Attorney General of the State of Minnesota filed an application for the stay of enforcement of the federal court's February 19, 1992 order.

Justice Blackmun, by order dated March 11, 1992, granted Appellant Growe's application for a stay with respect to the state legislative redistricting plan, but denied the application for a stay with respect to the congressional redistricting

Justice Blackmun's order only stayed the federal Court's order when it conflicted with the State Court's adopted legislative redistricting plan.

Here, as in Emison, no state court had adopted a congressional redistricting plan at the time of the May 5, 1992 order. The district court properly did not abstain. The resulting delay of the adoption of a plan through State court proceedings had the potential to seriously undermine the voting rights of Latino voters.[5]

---

plan.

[5] Other cases cited by appellants also do not sustain their argument for abstention. In Mahoney v. Burkhardt, 299 F. Supp. 787 (D.N.J. 1969), the panel refused enjoin impending primary elections after an interim apportionment plan had been certified by the New Jersey Supreme Court. In Ince v. Rockerfeller, 290 F. Supp. 878 (S.D.N.Y. 1968), the court abstained from litigating the constitutionality of a plan that had been adopted by the New York Court of Appeals,

3. Younger And Burford Abstention Were Inapplicable

Appellants take the extraordinary and unprecedented position that PRLDEF

---

primarily because the plan involved New York State Constitutional questions concerning the creation of State Assembly districts. see, id, 290 F. Supp. at 885. In Silver v. Jordan, 263 F. Supp. 627 (C.D. Cal. 1966), the court refused to dismiss plaintiffs' claims, but abstained after the Supreme Court of California had entered an order holding that the "circumstances [did] not compel overriding [the existing] constitutional plan by limiting the terms of members of the board to be elected." Id. at 629. Here, it was undisputed that the existing congressional plan cannot be maintained; nor, is there any question that elections must be held for congressional representatives in 1992. The stay entered by this court, in Voinovich, et al. v. Quilter, et al. 503 U.S. ____ (1992), is irrelevant to the question presented here. No issue was presented in Quilter concerning a conflict between federal and state court jurisdiction. see Voinovich, 60 U.S.L.W. 3809, prob. juris. noted. June 2, 1992. Rather, the primary issues concerned whether reapportionment officials had to demonstrate a §2 violation, in a non-section 5 jurisdiction, before, they could create majority-minority districts. The district court held they did. This Court stayed that decision.

plaintiffs may be divested from litigating their civil and voting rights claims in federal court, under Younger v. Harris, 401 U.S. 37 (1971), merely, because appellants have filed a related action in State court. This Court has never gone so far as to require abstention by a federal court, where non-parties to a State action who have no identify of interests with State court parties, as PRLDEF plaintiffs are here, would be divested of their chosen federal forum. Sullivan, 811 F.2d at 178 n.71. This Court has held precisely to the contrary. See Doran v. Salem Inn, 422 U.S. 922 (1975); Sullivan supra, 811 F.2d at 176-178.[6]

---

[6] The Appellants now assert to the first time on appeal that abstention was required under Colorado River Water Conversation Dist. v. United States, 424 U.S. 800 (1976). First, as in Younger abstention, Colorado River abstention requires an identity of parties. see Alliance of America Insurers v. Cuomo, 854

F. 2d 591, 603 (2d Cir. 1988). Second, the "exceptional circumstances" justifying abstention under Colorado River were not here. These circumstances are: (1) the convenience or inconvenience of the forum; (2) whether piecemeal litigation can be avoided; (3) the order in which jurisdiction was obtained; (4) the source of law for decision; (5) whether the State court can adequately protect the rights of the party seeking jurisdiction, and (6) the court first asserting jurisdiction an in rem action. Cuomo, 854 F. 2d. at 602-603. First, the state court is no more convenient than the federal court. Second, piecemeal litigation was properly avoided by the federal court's May 5, 1992, order refusing to abstain and enjoining the state action. Third, jurisdiction was obtained simultaneously by federal and state courts. Fourth, federal law is the source of law for decisions. Fifth, only the federal court could craft a plan in exigent circumstances without preclearance and with direct appeal to this court; and was, thus, the only court which could adequately protect plaintiffs' rights. The delay attendant to state court proceeding would have damaged plaintiffs' voting rights. State court proceedings could have required multiple levels of appellate review and then preclearance of any adopted plan pursuant to 42 U.S.C. §1973c. Sixth, the federal court first asserted jurisdiction over the res of congressional lines by entering relief on April 7, 1992, requiring the parties to submit proposed lines for New York's

At the time of the order, only PRLDEF plaintiffs in the federal action sought to protect the rights of Latino voters not be discriminated against under federal law. Moreover, plaintiffs in the Reid State court action included a number of incumbent members of the United States House of Representatives who are electorally advantaged by delay which shortens the campaign period, while appellees herein represent the interests of disenfranchised Latino voters and potential Latino candidates who will be electorally disadvantaged by delay. See Badham, 721 F.2d at 1173.

Appellants further assertion that abstention under Burford v. Sun Oil Company, 319 U.S. 315 (1943), applied here is also without merit. As explained by

---

congressional districts.

the United States Court of Appeals for the Seventh Circuit, Ryan v. State Board of Elections, 661 F.2d 1130 (7th Cir. 1981), in rejecting such an argument:

> [The pending voting rights] cases involve no state regulatory issues. In fact they involve no issues of state law whatsoever. A federal court decision would not interfere with any state problem. The only "coherent policy" surrounding the reapportionment issue is adherence to the federal constitutional requirement of "one-person, one-vote." Davis v. Mann, 377 U.S. 678, 690, 84 S.Ct. 1441, 1447, 12 L.Ed.2d 609 (1963). Burford abstention is inapplicable.

[661 F.2d at 1135-36 (citations partially omitted)]; cf., NOPSI, 491 U.S. at 360-364.

* * *

As has been demonstrated above, the federal court properly retained jurisdiction over PRLDEF plaintiffs' claims. The federal court had a clear primacy of interest in providing relief to

plaintiffs. Furthermore, the interests of comity as reflected in the various abstention doctrines did not outweigh the federal court's primacy. We, thus, turn to whether the Court properly exercised its discretion to enjoin the State court from developing a conflicting remedy for the legislature's failure to act.

B. THE STATE ACTION WAS PROPERLY ENJOINED UNDER THE AUTHORITY CONFERRED BY THE ALL WRITS ACT

1. The District Court Did Not Abuse Its Discretion By Staying The State Court Proceeding

"[F]ederal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295

(1970).

Once the Court properly exercised its discretion not to abstain, it's only recourse was to enjoin the State court proceeding to protect its jurisdiction. The situation is not unlike a dispute over the control of property. There cannot be two sets of Congressional lines any more than there can be two legal owners of the same property. When there are two court proceedings to determine the ownership of real property, the court with the greatest interest appropriately exercises its jurisdiction to enjoin the other court from proceeding. See, e.g., Penn General Casualty v. Pennsylvania ex rel. Schnader, 194 U.S. 189 (1935). The common res here are the congressional districts; there can be only one legal set of such districts.

Further, appellants concede that a federal court properly enjoins a State

court proceeding where there is "a pre-existing order adjudging the merits in a mature federal action." Jur. at 14. They also concede that liability had been established before the federal court. See, Jur. at 17 ("no one asserts that New York may employ its existing 34 congressional district lines to hold an election to fill the 31 seats now allotted to New York; everyone concedes that new lines are essential").

Thus, the district court was wholly within its authority under the All Writs Act, 28 U.S.C. § 1651, to enter an injunction to protect it ability to effectuate a remedy without interference of the State court. See cases cited in footnote 4 of Appellants' Jurisdictional Statement. Such orders may be "against non-parties to a civil rights action to vindicate the constitutional rights of

existing parties." Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 864 (2d Cir. 1988). The district court acted wholly within its appropriate discretion.

2. There Is No Statutory Prohibition In Entering Injunctive Relief Staying Pending State Court Proceedings'

Contrary to appellants' assertions the Anti-Injunction Act does not apply here. Under the Anti-Injunction Act, "[a] court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. PRLDEF plaintiffs have brought claims for the deprivation of their right to vote pursuant to 42 U.S.C. § 1983; it is black letter law that an injunction based on these claims comes within the "expressly authorized" exception of the

Anti-Injunction Act. Mitchum v. Foster, 407 U.S. 225 (1972).

Appellants cite no case, and there is no support, for the proposition that injunctions of State court proceedings in actions with § 1983 claims are statutorily prohibited. As the Solicitor General acknowledged in the submission of the United States, with respect to the Appellants' requested stay, Mitchum v. Foster holds injunctions in actions predicated on § 1983 claims are within the "expressly authorized" exception to and are not precluded by the Anti-Injunction Act.

Mitchum, while removing the statutory barrier, nevertheless, does "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court to enjoin a state court proceeding." 407 U.S. at 243.

However, the district court acted in a manner fully consonant with these jurisprudential concerns. Principles of equity, comity and federalism all weighed in favor of the issuance of the injunction.

As demonstrated above, there was, and is, no comity interest in having federal claims adjudicated in a State forum, qua forum. Rather, there is strong precedent in favor of maintaining a federal forum here. Further, there was no State interest in having the State Court draw New York's congressional districts. The State's interest in drawing it's own congressional lines is lodged in the State legislature, subject to the approval or veto of the Governor. The State legislature had voiced no interest in having the lines drawn in state court as opposed to federal court. At the time of

the district court's order, half of the Legislature, the Senate defendants, sought a federal forum and made motions to remove the State court proceeding to federal court, and later to enjoin the State court proceedings. The appellant State Assembly along with several incumbent Democratic Congressman (Reid plaintiffs) wanted the State courts to do it. The Governor had taken no position. The Assembly could no more assert the "State's" interest than the Senate could. Thus, there was no showing that it is in the interest of the State, as represented by the full legislature and governor, in having congressional lines drawn in the State courts. Clearly, comity, a discretionary concept in any event, can be waived by a state. This distinguishes this case from others in which the State legislature as a whole raised these comity interests.

Moreover, there was many equitable and just reasons for the district court to proceed, including harm to PRLDEF plaintiffs' § 1983 rights caused by simultaneous State court proceedings. These reasons included:

1. Preventing plaintiffs from being divested their chosen forum to adjudicate their federal rights.

2. Preventing plaintiffs from being forced to adjudicate their claims under § 2 and, potentially § 5 of the Voting Rights Act, of 1965, and under the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 in State Court or lose an opportunity to assert those rights.

3. Preventing the delay attendant upon having such federal claims being adjudicated at the State trial court, three levels of appellate review, and then reviewed by the Justice Department when petitioning to qualify as a congressional candidate begins in four weeks and plaintiffs have asserted the existing congressional map discriminates against Latino voters.

4. Preventing the irreparable harm to the right to vote of Latino voters and potential Latino candidates who, because of delay, have no way of assessing either who to support or whether to run for office.

5. Preventing the irreparable harm to the right to vote of Latino voters and potential candidates, who because of two possible sets of Congressional lines, one set created by the federal court and the other created by the State court, would still have no way of assessing either who to support or whether to run for office.

6. Preventing irreparable harm to voting rights of Latino voters and potential candidates under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, who would be denied an equal opportunity to elect representatives of their choice, because they are relatively disenfranchised would be disproportionately disadvantaged by delay, while non-Latino incumbents and their supporters would be disproportionately advantaged by delay caused by creating lines through State court proceeding.

It is well-settled that the claimed deprivation of a constitutional right such

as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm. Reynolds v. Sims, 377 U.S. 533, 562, 565, 84 S. Ct. 1362, 1381, 1383, 12 L.Ed.2d 506 (1964); Dillard v. Crenshaw County, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); Harris v. Graddick, 593 F. Supp. 128, 135 (M.D. Ala. 1984) (The Voting Rights Act "and its history reflect a strong national mandate for the immediate removal of all impediments, intended or not, to equal participation in the election process. Thus, when [the Voting Rights Act] is violated the public as a whole suffers irreparable injury."); C. Wright and A. Miller, Federal Practice and Procedure § 2948, at 440 (1973).

CONCLUSION

For the foregoing reasons Appellees' Motion To Dismiss Appeal And To Affirm the Ruling of the Trial Court should be granted.

Dated: June 17, 1992

Respectfully submitted,

Arthur A. Baer

RUBEN FRANCO, ESQ.
ARTHUR A. BAER, ESQ.*
KENNETH KIMERLING, ESQ.
Puerto Rican Legal Defense
and Education Fund, Inc.
99 Hudson Street, 14th Fl.
New York, New York 10013
(212) 219-3360

ATTORNEYS FOR PLAINTIFFS-APPELLEES
PUERTO RICAN LEGAL DEFENSE AND
EDUCATION FUND, INC., AND
EVELYN CORCHADO
* Counsel of Record

Supreme Court, U.S.
FILED
JUN 24 1992
OFFICE OF THE CLERK

(3)

No. 91-1862

In The

Supreme Court of the United States

October Term, 1991

DAVID GANTT, *et al.*,

Appellants,

v.

DEAN SKELOS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of New York

SUGGESTION OF MOOTNESS

CHARLES J. COOPER
(Counsel of Record)
MICHAEL A. CARVIN
ROBERT J. MCAULIFFE
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

GREGG M. MASHBERG
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

Attorneys for Appellees Dean Skelos, Ralph Marino and the Senate of the State of New York

BEST AVAILABLE COPY

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

DAVID GANTT, individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; SAUL WEPRIN, Speaker of the Assembly of the State of New York; and THE ASSEMBLY OF THE STATE OF NEW YORK, ASQUITH REID, MORTON M. AVIGDOR, VIVIAN BRIGHT, BERNARD FREILICH, CORINNA GRANT, LARAINE A. GRANDE, LORRELLE HENRY, and LUIS OSORIO, each a voter in the State of New York; and GARY L. ACKERMAN, FLOYD H. FLAKE, THOMAS J. MANTON, MAJOR R. OWENS, CHARLES B. RANGEL, CHARLES E. SCHUMER, and STEPHEN J. SOLARZ, each individually as a voter in the State of New York and as a Member of the U.S. House of Representatives,

Appellants,

DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; RALPH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.; EVELYN CORCHARDO and MICHAEL T. WARING,

Appellees.

STATEMENT

Appellees file this memorandum to advise the Court of certain facts that, in appellees' view, render this case moot.

The questions that appellants David Gantt, *et al.*, raise on this appeal are twofold:

1. Whether the three-judge district court below erred in declining to abstain from adjudicating an apportionment dispute over congressional redistricting in which there are no disputed issues of state law; and

2. Whether the three-judge district court below, having declined to abstain, erred in enjoining a state court from adjudicating the same apportionment dispute over congressional redistricting.

Appellees believe that these questions have been mooted by intervening events and by appellees' voluntary withdrawal of their motion filed with the three-judge court below to enjoin the state court from adjudicating the congressional redistricting case pending before it.

On May 5, 1992, the three-judge district court issued an order denying appellants' abstention motion and granting appellees' motion to enjoin all parties and counsel from proceeding in the action entitled *Reid, et al. v. Marino, et al.*, No. 9567/92, pending in the Supreme Court of the State of New York for the County of Kings (the "State Court Action") (the three-judge federal court's Memorandum and Order of May 5, 1992, is reprinted in Appellants' Appendix at App. 1a-10a). Two days later, appellants filed in this Court an application for stay

pending appeal of the three-judge federal court order. On May 13, 1992, on a reference from Justice Thomas, this Court entered an order staying the portion of the lower court's order that enjoined the parties and counsel from proceeding in the State Court Action.

The State Court Action proceeded, and on June 1, 1992, the court-appointed panel of referees submitted to the court a preliminary report including a proposed congressional reapportionment plan. After a hearing on June 5, 1992, the state court found the plan submitted by the referees to be complete and valid under the Constitutions of the United States and the State of New York, as well as the Federal Voting Rights Act. *See* Order and Judgment of Supreme Court of the State of New York for the County of Kings dated June 8, 1992 (Appendix 001). The state court adopted the plan in its entirety as the congressional reapportionment plan for the State of New York (the "State Plan"). *Id.*

On June 8, 1992, the New York State Senate approved a bill adopting the State Plan, and on June 9, 1992, the New York Assembly enacted the same bill. Both bills were signed by Governor Cuomo on June 12, 1992. The State Plan was submitted to the United States Department of Justice for preclearance under Section 5 of the Voting Rights Act on June 17, 1992.

Meanwhile, the three-judge district court also continued to adjudicate the congressional redistricting case before it. On May 27, 1992, the court appointed special master, after conducting a hearing, submitted a proposed congressional reapportionment plan and report to the district court. On June 11, 1992, after a hearing on June 3,

1992, the district court issued an order adopting the special master's proposed plan as a lawful and proper apportionment of New York's congressional districts (the "Federal Plan"). *See* Order of three-judge federal court dated June 11, 1992 (Appendix 013). Also in its June 11, 1992 Order, however, the district court directed that the Federal Plan would be implemented only if the State Plan did not receive preclearance under Section 5 of the Voting Rights Act by the United States Department of Justice by July 8, 1992.

Because the State Court Action has now been fully adjudicated, the question whether the three-judge district court erred on May 5, 1992, in enjoining the State Court Action has become moot.[1]

In recognition of these facts, appellees filed a motion on June 19, 1992, in the three-judge district court to withdraw their earlier motion to enjoin the State Court Action. *See* Defendants Marino, Skelos, and the New York State Senate's Motion to Withdraw Their Motion for an Order Enjoining the State Court Proceedings (in the form of an Order to Show Cause and Affidavit) (Appendix 018). Appellants have agreed not to oppose this motion. The three-judge federal court's granting of the motion to withdraw will remove the order challenged in this

---

[1] We note that plaintiffs-appellees Puerto Rican Legal Defense and Education Fund, Inc. and Evelyn Corchado agree that this appeal has been mooted because the State Court Action has been fully adjudicated. *See* Plaintiffs-Appellees Puerto Rican Legal Defense and Education Fund, Inc. and Evelyn Corchado's Motion to Dismiss Appeal and to Affirm Ruling of the Trial Court at 1-3.

appeal. Consequently the questions presented by this appeal are moot.

For these reasons, appellees suggest that the issues sought to be raised are moot and that the appeal should be dismissed, that the three-judge district court's order enjoining the State Court Action should be vacated, and that the cause should be remanded to the three-judge district court with directions to dismiss the order enjoining the State Court Action. *See Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979); *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950).[2]

---

[2] With respect to the three-judge district court's decision *not* to abstain from exercising jurisdiction, *see* the three-judge federal court's Memorandum and Order of May 5, 1992, reprinted in Appellants Appendix at App. 1a-10a, that order is not immediately appealable. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (a district court order denying a motion to stay or dismiss an action where a similar suit is pending in state court is not immediately appealable under 28 U.S.C. § 1291 nor under 28 U.S.C. § 1292). Consequently, an appeal of that decision is not properly before the Court.

Dated: June 19, 1992

Respectfully submitted,

/s/ Charles J. Cooper
CHARLES J. COOPER
(Counsel of Record)
MICHAEL A. CARVIN
ROBERT J. MCAULIFFE
SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

GREGG M. MASHBERG
PROSKAUER ROSE GOETZ &
MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

Attorneys for Appellees
Dean Skelos, Ralph Marino
and the Senate of the
State of New York

APPENDICES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

ASQUITH REID, et al.,

Plaintiffs,

vs.

RALPH J. MARINO, et al.,

Defendants.

----------X

Index No. 9567/92

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the annexed is a true and accurate copy of the foregoing Order and Judgment duly entered in the above-captioned action and filed in the office of the Clerk of the County of Kings on June 9, 1992.

Dated: New York, New York
June 10, 1992

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) (373-3000)

Attorneys for Plaintiff

TO: Parties on Attached Service List

MEMORANDUM

SUPREME COURT COUNTY

ASQUITH REID, et al Plaintiffs, vs. RALPH J. MARINO, et al. Defendants.	By SHAW J.S.C. Dated June 8, 1992 Order and Judgment Index #9567/92

Earlier this year when the New York State legislature failed to enact a congressional reapportionment plan reducing the number of congressional seats from 34 to 31 and then creating 31 districts equal in population based on the 1990 census, several lawsuits were commenced requesting the judiciary to adopt a redistricting plan. Two suits were instituted in different Federal District Courts of New York State and consolidated before a 3-judge panel in the Eastern District of New York. Another such action was begun in the Supreme Court, Kings County and assigned to this Justice.

The commencement of this action was accompanied by an order to show cause in which the plaintiffs requested certain injunctive relief. At oral argument of the motion on April 24, 1992, this court dictated a decision and order into the record holding that if the New York State Legislature failed to enact a reapportionment plan by May 4, 1992, the court would undertake this task. The parties where therefore instructed to submit to the court their proposed congressional redistricting plans

and accompanying supporting documents and names of proposed independent experts to serve as referees. The decision and order further provided, however, that if at any time during the course of these proceedings a congressional reapportionment plan were validly enacted by the legislature, the court would entertain an application to dismiss this action.

On May 4, 1992, this court was advised by the attorneys for the parties that the legislature had taken no action with respect to congressional reapportionment, and as of this writing had still not enacted any such plan. This court therefore issued a decision and order the following day, May 5, in which it retained jurisdiction and assumed responsibility, which the legislature had abdicated by their inaction, for the adoption of a congressional redistricting plan, and appointed a panel of three referees pursuant to CPLR 4001, 4201 et seq and 4311 et seq to assist the court in this undertaking. The referees were to hear and report, and submit to this court on or before May 26, 1992 a complete and valid reapportionment plan for the congressional districts of the State of New York. In a subsequent decision and order dated May 14, 1992, a substitution was made for one of the referees. The panel of referees, to whom the court and the People of this State are now indebted for their distinguished public service, consisted of:

Hon. Vincent A. Delorio (nominated by the parties)

Dean Frank J. Macchiarola (nominated by the parties)

Hon. Philip D. Roache (designated by the court)

Prior to the substitution of one of the referees, the 3-judge federal panel in the Eastern District of New York, issued a preliminary injunction enjoining the parties in that lawsuit from proceeding any further in the action before this court. That decision was appealed to the United States Supreme Court which issued a stay of the injunction, allowing this court to proceed. The United States Supreme Court has not yet ruled on the merits of the District court's issuance of the preliminary injunction or its denial of a motion to abstain from accepting jurisdiction over reapportionment in favor of the State Court proceeding.

The referees in this matter submitted a preliminary report to this court on June 1, 1992; copies were distributed immediately to the parties and a preliminary hearing held on June 2, 1992. The final, unanimous report was distributed on June 4, and a hearing held on June 5.

At the June 5th hearing, all parties and subsequent intervenors were given an opportunity to comment on the merits of the redistricting plan proposed by the referees. The court recognizes that no reapportionment plan can be perfect in every detail, and none can be drawn that will be satisfactory to everyone. However, upon listening to all of the comments and suggestions on various aspects of the plan, and based upon the court's own examination of the proposed plan, the court finds the plan submitted by the referees to be complete and valid under the constitutions of the United States and the State of New York as well as the Federal Voting Rights Act. The court further concludes that this plan is the only one presently before any court that fully comports with these requirements and other applicable criteria as set forth in the referees'

report. The court adopts the plan in its entirety, unchanged, as the Congressional Reapportionment Plan for the State of New York and hereby promulgates and establishes it to govern the election of Members of Congress at the November 1992 election and subsequent elections. The final report of the referees, embodying this plan, together with all its appendices is annexed to and made a part of this decision and order.

It is further ordered that the defendant New York State Board of Elections, in accordance with its statutory duties, shall forthwith implement the terms of the court's redistricting plan as set forth in the appendix to this decision.

The legislature's failure to perform its statutorily mandated duty in a timely fashion has required the court to appoint referees, who are to be compensated for their labor. The referees have incurred expenses in developing a valid congressional reapportionment plan and have employed various personnel to assist them in completing this task. Therefore, an appropriate order will be entered taxing costs against the legislative defendants for the referees' fees and expenses, the fees and expenses of the experts retained by them and their staff as well as the printing, computer and miscellaneous charges incurred in the production of the referees' report. The referees shall submit an itemization of these fees and expenses forthwith.

Jurisdiction over this matter is retained for the purpose of making any further orders deemed necessary to ensure the effectuation of this decision and order.

The foregoing constitutes the decision order and judgment of the court and the clerk of this court is instructed to enter this order and judgment forthwith.

ENTER,

/s/ James H. Shaw
J.S.C.

CERTIFICATE OF SERVICE

I, Nicole L. Felton, do hereby certify that the foregoing Notice of Entry was served upon the parties on the attached service list in the manner specified on the attached service list on this 10th day of June 1992.

/s/ Nichole L. Felton
Nicole L. Felton, Esq.

Service List

The Honorable George C. Pratt (By Fed. Ex.)
U.S. Courthouse
Uniondale Avenue at
Hempstead Turnpike
Uniondale, New York 11533

The Honorable John S. Martin, Jr. (By Fed. Ex.)
U.S. Courthouse
40 Foley Square
New York, New York 10007

The Honorable Sterling Johnson, Jr. (By Fed. Ex.)
U.S. Courthouse
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Arthur A. Baer, Esq. (By Hand)
Puerto Rican Legal Defense and
Education Fund
99 Hudson Street
New York, New York 10013
(Counsel for federal court
plaintiffs)

Joel Graber, Esq. (By Hand)
Assistant Attorney General
120 Broadway
New York, New York 10271
(Counsel for Cuomo, Lundine
and the Board of Elections)

C. Daniel Chill, Esq. (By Hand)
Graubard, Mollen, Horowitz,
Pomeranz & Shapiro
600 Third Avenue, 33rd Floor
New York, New York 10016-1903
(Counsel for Saul Weprin,
David Gantt and the New York
State Assembly)

Gregg M. Mashberg, Esq. (By Hand)
Proshauer Rose Goetz & Mendelsohn
1585 Broadway
New York, New York 10036
(Counsel for Marino, Skelos and
the New York State Senate)

Charles J. Cooper, Esq. (By Fed. Ex.)
Shaw, Pittman, Potts & Trowbridge
2300 N. Street, N.W.
Washington, D.C. 20037
(Counsel for Marino, Skelos and
the New York State Senate)

Defendant The New York State Board of Elections
Commerce Plaza
P.O. Box 4
Albany, New York 12260 (By Mail)

Eugene F. Pigott, Jr., Esq.
Offerman, Mahoney, Cassano, Pigott, Greco & Whalen
1776 Statler Towers
Buffalo, New York 14202
(Counsel for federal court plaintiff Michael T. Waring) (By Mail)

Ronald Starkweather
Commissioner of the Board of Elections
County of Monroe
39 West Main Street
Rochester, New York 14614 (By Mail)

M. Betsy Relin
Commissioner of the Board of Elections
County of Monroe
39 West Main Street
Rochester, New York 14614 (By Mail)

Stanley Kalmon Schlein, Esq.
Whitman & Ransom
200 Park Avenue
New York, New York 10166
(Counsel for Nita Lowey) (By Hand)

Paul Wooten, Esq.
214 Jefferson Avenue
Brooklyn, New York 11216
(Counsel for Congressman Major R. Owens, Karl B. Morgan and Penelope Fujiko Willgrodt) (By Mail)

Judith Reed, Esq. (By Hand)
NAACP Legal Defense and
Education Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(Counsel for NYS African-
American Political Action
Committee, Linda Breckenridge,
Isaiah Thomas, Mary Murphy,
Leroy Sawyer and Vivian Bright)

Nathan Lewin, Esq. (By Mail)
Miller, Cassidy, Marroca & Lewin
2555 M Street, N.W.
Washington, D.C. 20037
(Counsel for Council of
Jewish Organizations of Boro Park,
United Jewish Organizations of
Williamsberg, Rabbi Bernard Freilich
and Adam Veneski)

David A. Barrett, Esq. (By Hand)
Duker & Barrett
90 Broad Street
New York, New York 10004
(Counsel for Madison Homeowners
Association, et al.)

E. Thomas Boyle, Esq. (By Mail)
Boyle, Shea, Nornes & Pines
1391 Veterans Memorial Highway
Hauppauge, New York 11788
(Counsel for James F. Gaughron)

Richard A. Palumbo, Esq. (By Mail)
Boylan, Brown, Code, Fowler,
Randall & Wilson
900 Midtown Tower
Rochester, New York 14604
(Counsel for Louise Slaughter)

Esmeralda Simons, Esq. (By Mail)
Dianne E. Dixon, Esq.
Center For Law and Social Justice
Medgar Evers College, CUNY
1473 Fulton Street
Brooklyn, New York 11216
(Counsel for Intervenors Majority
Coalition For Fair Reapportionment,
Celeste Morris, Edward L. Baca
and Tzylai Chang)

Kathleen L. Wilde, Esq. (By Hand)
American Civil Liberties Union
132 West 43rd Street
New York, New York, 10036

Christopher Hanson (By Hand)
IPR Redistricting Association
NYC Latino Voting Rights Committee
286 Fifth Avenue – Room 301
New York, New York 10001

Armando Montano, Esq. (By Mail)
1217 Castle Hill Avenue
Bronx, New York 10462
(Counsel for the NYC Latino
Voting Rights Committee)

Roy Smith, Esq. (By Mail)
384 East 149th Street
Bronx, New York 10455
(Counsel for African-American
Legal Defense and Education
Fund, Neva Shillingford and
James Rickens)

Congressman Gary L. Ackerman (By Mail)
U.S. House of Representatives
238 Cannon House Office Building
Washington, D.C. 20515

Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and EVELYN CORCHARDO,

Plaintiffs,

- against -

DAVID GANTT, *et al.*,

Defendants.

92-CIV-1521(SJ)

ORDER

(Filed June 11, 1992)

MICHAEL T. WARING,

Plaintiff,

- against -

DAVID GANTT, *et al.*,

Defendants.

92-CIV-1776(SJ)

On June 3, 1992, this three-judge court heard objections to an argument concerning the congressional redistricting plan submitted by Special Master Frederick B. Lacey. On that date, respective counsel for the senate majority and for the assembly majority both represented to us that by Wednesday, June 10, 1992, the legislature would approve (1) a congressional redistricting plan other than the one submitted by the Special Master, and (2) an amendment to the New York Election Law that would provide, *inter alia*, that the process of gathering signatures on designating petitions shall begin on July 9,

1992, rather than June 9, 1992. *Compare* N.Y. Elec. Law §§ 6-134(6) *and* 6-158(1) (*McKinney* Supp. 1992).

This court indicated, on June 3, 1992, that it would, soon after June 10th, enter an appropriate order with respect to the interrelationship between, and effect of, the Special Master's plan and the state plan.

Both houses of the state legislature have now approved a bill adopting a reapportionment plan and a bill adopting the promised changes in the election laws. Both bills have now been signed by the governor.

"A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act", *Conner v. Johnson*, 402 U.S. 690, 691 (1971) (*per curiam*), thus, preclearance of the Special Master's plan by the Department of Justice is not required. However, a legislatively-approved plan requires preclearance by the Department of Justice, *see, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). Of course, preclearance of the state plan may not occur, or it may be delayed. Since all parties agree that a redistricting plan must be in place before the signature-gathering process starts, so that candidates can know the boundaries of the districts they hope to represent, we hereby ORDER the following:

1. The Special Master's plan as submitted is hereby accepted and approved by this court as an appropriate and proper apportionment of New York's 31 congressional districts.

2. Subject to further order of this court, if the plan adopted by the state legislature, or some duly approved modification thereof is not in place, *i.e.*, both adopted as law in the State of New York and precleared, by 5:00 pm

on July 8, 1992, then the Special Master's plan shall operate as the plan for congressional districts for the State of New York for the 1992 elections.

A written opinion setting forth the court's reason for not holding any further hearings, for approving the Special Master's plan, and for conditionally establishing the Special Master's plan at this time will be filed in the near future.

In view of some of the issues raised by the parties' submissions to this court, we invite any interested parties to submit briefs, by June 19, 1992, on the issue of the extent to which, if at all, this court may and should pass on the legality of the state plan.

SO ORDERED:

/s/ George C. Pratt
GEORGE C. PRATT
United States Circuit Judge

/s/ John S. Martin, Jr.
JOHN S. MARTIN, JR.
United States District Judge

/s/ Sterling Johnson, Jr.
STERLING JOHNSON, JR.
United States District Judge

DATED: BROOKLYN, NEW YORK
JUNE 11, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AND EVELYN CORCHADO,

Plaintiffs,

-again-

DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RALPH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

92 CIV. 1521 (SJ)

Defendants.

ORDER TO SHOW CAUSE

MICHAEL T. WARING,

Plaintiff,

– against – 92 Civ. 1776

DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe,

Defendants.

_____X

UPON the annexed affidavit of Gregg M. Mashberg, sworn to June 19, 1992, and the exhibits thereto, including the decision and order of this Court dated May 5, 1992 pursuant to which counsel and the parties in the action pending in the Supreme Court of the State of New York,

County of Kings, captioned *Reid, et al. v. Marino et al.*, IAS Part 6, index no. 9567/92 (the "State Court Action") were enjoined from taking any further steps to prosecute the State Court Action, and the decision and order of this Court dated June 11, 1992 pursuant to which the congressional plan adopted by this Court will be implemented only if the State Legislature's plan fails to obtain preclearance under Section 5 of the Voting Rights Act from the United States Department of Justice by July 8, 1992, and all prior proceedings had herein, it is hereby

ORDERED, that the plaintiffs and defendants in this action and the State Court Action show cause before the Honorable Sterling Johnson, Jr., United States District Judge, United States Courthouse, Brooklyn, New York, on June 27, 1992 at 9:30 A.M., why an order should not be made and entered herein authorizing defendants Marino, Skelos and the New York State Senate to withdraw their April 21, 1992 motion to enjoin further proceedings in State Court Action, and for such other relief as the Court deems just and proper; and it is further

ORDERED, that service of this Order, and the papers upon which it is based, (i) on or before June 24, 1992 at 5:00 p.m., upon the following attorneys for the parties by hand:

Paul, Weiss, Rifkind, Wharton & Garrison
Attorneys for Plaintiffs in the State Court Action
1285 Avenue of the Americas
New York, New York 10019

Joel Graber, Esq.
Assistant Attorney General
Attorney for Mario Cuomo, Stan Lundine
and the Board on Elections in the State Court

Action and in the PRLDEF Action
120 Broadway
New York, New York 10271

Dan Chill, Esq.
Graubard, Mollen, Horowitz, Pomeranz & Shapiro
Attorneys for (i) defendants the Assembly of the State of New York, and Saul Weprin in the State Court Action and (ii) Defendants Gantt, the Assembly half of the New York State of Legislative Task Force on Demographic Research and Reapportionment, Saul Weprin, and the Assembly of the State of New York in the PRLDEF Action
600 Third Avenue
New York, New York 10016

Arthur A. Baer, Esquire
Puerto Rican Legal Defense and Education Fund
Attorney for the Plaintiffs in the PRLDEF Action
99 Hudson Street
New York, New York 10013

and (ii) on or before June 24, 1992 upon the following parties by mail:

Eugene F. Pigott, Jr., Esq.
Offerman, Mahoney, Cassano, Pigott, Graco & Whalen
1776 Statler Towers
Buffalo, New York 14202
(Counsel for plaintiff Michael T. Waring)

Stanley Kalmon Schlein, Esq.
Whitman & Ransom
200 Park Avenue
New York, New York 10166
(Counsel for Intervenor Nita Lowey)

Paul Wootan, Esquire
214 Jefferson Avenue
Brooklyn, New York 11216
(Counsel for Intervenors
Congressman Major R. Owens, Karl B. Morgan
and Penelope Fujiko Willgrodt)

Judith Reed, Esq.
NAACP Legal Defense and Educational
Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(Counsel for Intervenors NYS African-American
Political Action Committee, Linda Breckenridge,
Isaiah Thomas, Mary Murphy, Leroy Sawyer
and Vivian Bright)

Nathan Lewin Esq.
Miller, Cassidy, Larocca & Lewin
2555 M Street N.W.
Washington, D.C. 20037
(Counsel for Intervenors Council of Jewish
Organizations of Boro Park, United Jewish
organizations of Williamsberg, Rabbi Bernard
Freilich and Adam Veneski)

David Barrett, Esq.
Duker & Barrett
90 Broad Street
New York, New York 10004

E. Thomas Boyles, Esq.
Boyle, Shea, Nornes & Pines
1393 Veterans Memorial Highway
Hauppauge, New York 11788
(Counsel for Intervenor James F. Gaughran)

Richard A. Palumbo, Esquire
Boyland, Brown, Code, Fowler,
Randall & Wilson
900 Midtown Tower
Rochester, New York 14604
(Counsel for Intervenor Louise Slaughter)

Esmeralda Simmons, Esq.
Dianne E. Dixon, Esq.
The Center for Law & Social Justice
at Medgar Evers College, CUNY
1473 Fulton Street
Brooklyn, New York 11216
(Counsel for Intervenors Majority Coalition
For Fair Reapportionment, Celeste Morris,
Edward L. Baca
and Tzylai Chang)

American Civil Liberties Union
132 West 43rd Street
New York, New York 10036

shall constitute good and sufficient service thereof; and it is further

ORDERED, that this Order, and the papers upon which it is based, shall be delivered on or before June 24, 1992 at 5:00 p.m. upon the following:

The Honorable George C. Pratt
U.S. Courthouse
Uniondale Avenue at Hempstead Turnpike
Uniondale, New York 11533

The Honorable John S. Martin, Jr.
U.S. Courthouse
40 Foley Square
New York, New York 10007

and it is further

ORDERED, that all answering papers in opposition to the relief requested, shall be personally served upon Proskauer Rose Goetz & Mandelsohn, attorneys for defendants Marino, Skelos and the Senate of the State of the New York, 1585 Broadway, 17th Floor, New York, New York 10036, on or before 5:00 p.m. on June 26, 1992; and it is further

ORDERED, that all answering papers in opposition to the relief requested, shall be served by hand upon this judge and the following judges:

The Honorable George C. Pratt
U.S. Courthouse
Uniondale Avenue at Hempstead Turnpike
Uniondale, New York 11533

The Honorable John S. Martin, Jr.
U.S. Courthouse
40 Foley Square
New York, New York 10007

on or before 5:00 p.m. on June 26, 1992.

/s/ Sterling Johnson Jr.
United States District Judge

Brooklyn, New York
June 19, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AND EVELYN CORCHADO,

Plaintiffs,

-against-

92 Civ. 1521 (SJ)

DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RALPH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Defendants.

AFFIDAVIT

---X

MICHAEL T. WARING,

Plaintiff,

- against -

DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe,

Defendants.

92 Civ. 1776 (SJ)

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

GREGG M. MASHBERG, being duly sworn, states:

1. I am a member of Proskauer Rose Goetz & Mendelsohn, co-counsel for defendants Marino, Skelos and the New York State Senate (the "Moving Defendants").

2. This affidavit is submitted in support of the Moving Defendants' motion to withdraw their April 21, 1992 motion for an order enjoining further proceedings in the action entitled *Reid, et al., v. Marino, et al.*, index no. 9567/92, pending in the Supreme Court of the State of New York for the County of Kings (the "State Court Action"). A copy of the order to show cause relating to the April 21 motion is annexed as Exhibit A.

3. In light of the intervening events since the April 21, 1992 filing of Moving Defendants' motion for an order enjoining the State Court Action, it is no longer necessary for the issues raised in that motion to be entertained.

4. On May 13, 1992, the United States Supreme Court stayed the portion of this Court's May 5, 1992, Order that enjoined the parties and counsel from proceeding in the State Court Action. A copy of this Court's May 5, 1992 Order is attached hereto as Exhibit B. The matter remains pending before the United States Supreme Court.

5. The State Court Action has proceeded, and on June 8, 1992, the state court adopted a congressional reapportionment plan for the State of New York (the "State Plan").

6. The State Legislature approved bills adopting the State Plan and governor Cuomo signed the bills on June 12, 1992.

7. The State Plan was submitted to the Justice Department for preclearance under Section 5 of the Voting Rights Act on June 17, 1992.

8. On June 11, 1992, this Court issued an order adopting the congressional reapportionment plan submitted by the special master (the "Federal Plan"). A copy of this Court's June 11, 1992 Order is attached hereto as Exhibit C.

9. This Court further ordered, however, that the Federal Plan would be implemented only if the States Plan does not receive preclearance under Section 5 of the Voting Rights Act from the United States Justice Department by July 8, 1992.

10. Because the State Court Action has now been fully adjudicated, the application underlying this Court's order enjoining the State Court Action has become moot. Moving Defendants are advising the United States Supreme Court that, in their view, the appeal from this Court's May 5 order is moot and, further, that they are making this motion.

11. Accordingly, Moving Defendants respectfully request that this Court grant this motion to withdraw their motion for an order enjoining the State Court Action.

12. This application is brought by Order to Show Cause due to the pressing time deadlines required for the implementation of a lawful congressional redistricting plan for the 1992 elections and the pendency of this matter before

the United States Supreme Court. No prior request for the relief requested herein has previously been made.

/s/ Gregg M. Mashberg
Gregg M. Mashberg

Sworn to before me
this 19 day of June, 1992.

/s/ Jean T. Bagdonas
Notary Public

JEAN THERESA BAGDONAS
Notary Public State of New York
No. 4957029
Qualified in Kings County
Commission Expires Oct. 2, 1992

No. 91-1862

Supreme Court, U.S.
FILED
JUL 23 1992
CLERK

IN THE

Supreme Court of the United States

October Term, 1991

DAVID GANTT, *et al.*,
Appellants,

vs.

DEAN SKELOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO APPELLEES' MOTIONS TO DISMISS AND AFFIRM AND SUGGESTION OF MOOTNESS

EDWARD N. COSTIKYAN
(Counsel of Record)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Counsel for Appellants Reid, Avigdor, Bright, Freilich, Grant, Grande, Henry, Osorio, Flake, Manton, Owens, Rangel, Schumer and Solarz

C. DANIEL CHILL
(Counsel of Record)
GRAUBARD, MOLLEN, HOROWITZ, POMERANZ & SHAPIRO
600 Third Avenue
New York, New York 10016
(212) 818-8800

Counsel for Appellants the Assembly of the State of New York, Saul Weprin and David Gantt

LIST OF PARTIES

Appellants

DAVID GANTT, individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; SAUL WEPRIN, Speaker of the Assembly of the State of New York; and THE ASSEMBLY OF THE STATE OF NEW YORK, ASQUITH REID, MORTON M. AVIGDOR, VIVIAN BRIGHT, BERNARD FREILICH, CORINNA GRANT, LARAINE A. GRANDE, LORRELLE HENRY, and LUIS OSORIO, each a voter in the State of New York; and GARY L. ACKERMAN, FLOYD H. FLAKE, THOMAS J. MANTON, MAJOR R. OWENS, CHARLES B. RANGEL, CHARLES E. SCHUMER, and STEPHEN J. SOLARZ, each individually as a voter in the State of New York and as a Member of the U.S. House of Representatives.

Appellees

DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; RALPH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.; EVELYN CORCHARDO and MICHAEL T. WARING.

TABLE OF CONTENTS

Page(s)

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY STATEMENT OF THE CASE 2

REPLY ARGUMENT 4

CONCLUSION 6

APPENDIX A1

MEMORANDUM OF DECISION
OF THREE-JUDGE COURT
JULY 10, 1992

TABLE OF AUTHORITIES

CASES **Page(s)**

Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 (1979) 5

Scott v. *Germano*, 381 U.S. 407 5

United States v. *Munsingwear Corp.*, 340 U.S. 36 (1950) 5

STATUTES

28 U.S.C. §2283 4

42 U.S.C. §1973 4

42 U.S.C. §1973b 3

42 U.S.C. §1973c 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-1862

DAVID GANTT, *et al.*,

Appellants,

vs.

DEAN SKELOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO APPELLEES' MOTIONS TO DISMISS AND AFFIRM AND SUGGESTION OF MOOTNESS

This is an appeal from an order of a three-judge court enjoining a parallel apportionment case pending in New York State Supreme Court. By order dated May 13, 1992, this Court stayed the injunction below during this appeal.

Appellees have responded to our appeal with (1) a motion to dismiss the appeal for want of a substantial federal question, (2) a motion to affirm the order below, and (3) a suggestion of mootness. For reasons other than those appellees advance, and based on events that have occurred since appellees filed their response, we agree that

the action below is now moot. Accordingly, we join in the suggestion of certain appellees that this Court vacate the order below and remand the action to the three-judge court with instructions to dismiss the action as moot.

REPLY STATEMENT OF THE CASE

The facts leading to this Court's May 13, 1992 order staying the injunction below are set forth in our Jurisdictional Statement (see "J.S." at 5-11). In brief, on March 26, 1992, certain voters commenced an action entitled *Reid, et al.* v. *Marino, et al.*, No. 9567/92, in the Supreme Court of the State of New York seeking an order directing New York State to enact a plan of apportionment for the State's 31 congressional districts and, if the State failed to act, providing for a court-devised apportionment plan. Five days later, another group of voters commenced the action below seeking essentially the same relief.

On May 5, 1992, the State having failed to enact apportionment legislation, the State Supreme Court appointed a panel of three referees to devise a congressional apportionment plan. (J.S., App. at 10a.) Later that same day, the federal court below also issued an order providing for the appointment of a special master to devise a congressional apportionment plan. In addition, denying a motion to abstain in favor of the State Supreme Court action, the lower court enjoined the parties and counsel in the State Supreme Court action from proceeding any further in that action. (J.S., App. at 8a.)

On May 13, 1992, on a reference from Justice Thomas of appellants' motion for a stay of this injunction pending appeal, this Court stayed the portion of the lower court's order enjoining the parties and counsel from proceeding in State Court, *David Gantt, etc., et al.* v. *Dean Skelos, etc., et al.*, __ U.S. __, No. 91-1862, A-829 (May 13, 1992). Thereafter, the federal court's special master and the State Court's panel of referees separately proceeded to devise congressional apportionment plans for submission to their respective courts. By June 1, 1992, the special master and the panel of referees had each prepared a report providing for a plan of

congressional apportionment. The plans differed in significant respects.

On June 8, 1992, the State Supreme Court entered a judgment adopting the report of its referees, finding the referees' plan to be in compliance with all applicable constitutional and statutory requirements, and directing the State election officials to implement the plan forthwith.[1/]

Within three days, by June 11, 1992, the State legislature passed and the Governor signed into law a congressional apportionment plan identical to the plan embodied in the State Supreme Court's judgment. Because three counties or "boroughs" within New York City are covered jurisdictions under section 4(b) of the Voting Rights Act, 42 U.S.C. §1973b, the State promptly submitted this apportionment legislation to the U.S. Department of Justice for preclearance review, under section 5 of the Voting Rights Act. 42 U.S.C. §1973c.

Also on June 11, 1992, the three-judge court below issued an order approving and adopting the report of its special master and finding the special master's plan to comply with all applicable constitutional and statutory requirements. The court directed that, if the Justice Department failed to preclear the State's apportionment legislation by July 8, 1992, then the State was to implement its special master's plan. (Sugg., App. at A13-17.)

On June 19, 1992, certain appellees—the parties defendant who had originally sought the injunction against the State Supreme Court action—moved to "withdraw" their motion for that injunction. (Sugg., App. at A18-27.)

[1/] The State Supreme Court's order and judgment appears beginning on page A1 of the appendices to the Suggestion of Mootness filed here by appellees Skelos, Marino, and the State Senate of the State of New York, which we hereafter cite as "Sugg., App."

On July 2, 1992, the U.S. Department of Justice advised the State of its decision to preclear the State's congressional apportionment legislation without objection.

On July 6, 1992, certain appellees—plaintiffs below—moved before the three-judge court for a preliminary injunction restraining the State from implementing the precleared apportionment legislation and imposing instead the plan proposed by the federal court's special master. These appellees argued that the State legislation violated section 2 of the Voting Rights Act. 42 U.S.C. §1973. On July 10, 1992, the three-judge court denied the motion without prejudice to plaintiff-appellees' right to challenge the State legislation in a new and separate proceeding. The court then dismissed the action below as moot. The court made no ruling on the pending application to "withdraw" the motion to enjoin the proceeding in State Supreme Court. (Reply App. at A1.)[2/]

The process for qualifying to appear on the ballot in the primary election for party nominations for Congress is now underway in accord with the State's legislation.

REPLY ARGUMENT

This action is now moot. The complaint below sought a determination that New York's existing congressional district lines were unconstitutional and violated the Voting Rights Act. Events occurring since the complaint was filed—specifically the State Supreme Court's judgment adopting a new congressional apportionment plan and, subsequently, the State's enactment of that plan in legislation duly precleared by the U.S. Justice Department—eliminated the basis for the complaint.

These events also render academic the questions presented on this appeal. Those questions are: (1) whether under the Anti-Injunction Act, 28 U.S.C. § 2283, the court below erred in enjoining the State Supreme Court from adjudicating a congressional

---

[2/] The citation is to the appendix to this Reply.

apportionment action, and (2) whether under *Scott* v. *Germano*, 381 U.S. 407 (1965), the court below erred in failing to abstain from exercising jurisdiction over a congressional apportionment case when the State Supreme Court was ready, willing, and able to adjudicate the same dispute.

No ongoing dispute remains for the resolution of these questions. This Court's stay of the injunction below enabled the State Supreme Court to adjudicate the congressional apportionment case pending before it. The State Supreme Court's judgment produced a plan that the State legislature and Governor enacted into law and that the U.S. Justice Department precleared. The court below has accepted this precleared legislation as dispositive of the issues presented to it. Consequently, no actual case or controversy exists on whether the lower court's injunction against the State Supreme Court action was error, or on whether the three-judge court should have abstained from exercising jurisdiction.

For this reason, we join in the suggestion of appellees Dean Skelos, Ralph J. Marino, and Senate of the State of New York that this action is now moot and that, consistent with *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979), and *United States* v. *Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950), this Court should vacate the order below enjoining the parties and counsel from proceeding in State Supreme Court, and then remand this action to the three-judge court with instructions to dismiss the action as moot. (See Sugg. at 4.)

CONCLUSION

For the foregoing reasons, the order appealed from should be vacated and the action remanded with instructions to dismiss the action as moot.

Dated: New York, New York
July 23, 1992

Respectfully submitted,

Edward N. Costikyan
(Counsel of Record)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Counsel for Appellants Reid, Avigdor, Bright, Freilich, Grant, Grande, Henry, Osorio, Flake, Manton, Owens, Rangel, Schumer and Solarz

C. Daniel Chill
(Counsel of Record)
GRAUBARD, MOLLEN, HOROWITZ, POMERANZ & SHAPIRO
600 Third Avenue
New York, New York 10016
(212) 818-8800
Counsel for Appellants the Assembly of the State of New York, Saul Weprin and David Gantt

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and EVELYN CORCHARDO,

Plaintiffs,

- against - CV-92-1521(SJ)

DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RALPH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Defendants.

----------x

MICHAEL T. WARING,

Plaintiff,

- against -

DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe,

Defendants.

----------x

MEMORANDUM OF DECISION

CV-92-1776(SJ)

BEFORE: PRATT, *Circuit Judge*, and MARTIN, Jr. and JOHNSON, Jr., *District Judges*.

In the last decision of this three-judge court, we approved the reapportionment plan recommended by the Special Master and provided that it would take effect on July 8, 1992, unless the state legislature's plan should become operative through preclearance by the Justice Department. Since that time, the Justice Department, by letter dated July 2, 1992, has granted preclearance by notifying the legislature's representatives that the Attorney General does not interpose any objection to the state's congressional redistricting plan and that it is satisfied that "this redistricting legislation was neither designed to discriminate against minority voters nor does it have a retrogressive affect on their voting rights."

By order to show cause dated July 6, 1992, plaintiffs have moved for a preliminary injunction designed to prevent implementation of the state's redistricting plan and seeking instead to implement the redistricting plan recommended by the Special Master and conditionally approved by this three-judge court. Memoranda in opposition to the motion were filed by the Senate Republicans and the Assembly Democrats. Upon the return of the motion before the three-judge panel on Thursday, July 9, 1992, all interested parties were given an opportunity to be heard.

Plaintiffs and others who represented members and groups of the New York City Latino community argued in favor of the Special Master's plan, contending that the state's plan did not sufficiently remedy prior dilution of the voting rights of Latinos, and therefore violated § 2 of the Voting Rights Act. Plaintiffs argued that their § 2 claim was asserted in the original complaint and continued to be viable under the existing complaint. In the event that the court should view the existing complaint as inadequate to support their present claim, plaintiffs moved orally to amend the complaint. Plaintiffs conceded that their § 2 claim was appropriate for a single district judge, but contended that it could also be entertained by this three-judge court. With respect to the motion for a preliminary injunction, plaintiffs argued that the dilution of their

voting rights constituted irreparable harm and that the past history of discrimination against the New York City Latino voting community presented a sufficient showing of likelihood of success on the merits.

Defendants and others opposing the motion contended that plaintiffs were too late in seeking to enjoin implementation of the state's congressional redistricting plan when the political processes for designating candidates to the 31 districts around the state had already begun; that the public interest required that the November 1992 congressional elections go ahead on the plan that the state legislature had developed; that the present action, having been originally brought as a challenge to the 34-district congressional plan that applied during the past decade, was now moot because that plan was replaced by the 31-district state plan adopted by the legislature and approved by the governor, and that any challenge to the new state redistricting plan under § 2 of the Voting Rights Act should be brought before a single district judge in a new action that could be subjected to the normal litigation procedures of pretrial motions, discovery, and direct and cross-examination of witnesses, all unhampered by the severe time constraints imposed by the November 19, 1992 election date.

After consideration of the prior proceedings in this action, of all the papers submitted on this motion, and of the oral arguments, and after due deliberation, IT IS ORDERED THAT:

1. Plaintiffs' motion, brought on by order to show cause dated July 6, 1992, seeking a preliminary injunction to implement the Special Master's congressional redistricting plan, is denied.

2. Plaintiff's oral motion to amend the complain is denied.

3. This action is dismissed as moot.

4. In denying the motions and dismissing the action, the court does not express or imply any opinion as to the merits of plaintiff's claim that the state redistricting plan dilutes violated § 2

of the Voting Rights Act by diluting the voting power of the New York City Latino community.

5. The clerk shall enter an appropriate judgment dismissing this action as moot.

SO ORDERED.

/s/ George Pratt (sj)
George C. Pratt
U.S. Circuit Judge

/s/ John Martin (sj)
John S. Martin, Jr.
U.S. District Judge

/s/ Sterling Johnson
Sterling Johnson, Jr.
U.S. District Judge

Dated: Brooklyn, New York
July 10, 1992.